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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1634

SECURITY SAVINGS AND LOAN ASSOCIATION OF DICKINSON, TEXAS,
Petitioner

v.

CITY SAVINGS ASSOCIATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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OF DICKINSON, TEXAS,
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CITY SAVINGS ASSOCIATION,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner is a savings and loan association duly chartered by the State of Texas with its accounts insured by an agency of the Federal government and lawfully operating in conformity with the laws of the State of Texas and of the United States.

Respondent has received from the Savings and Loan Commissioner an amended order under the terms of which respondent would have been chartered as a savings and loan association had petitioner not instituted the litigation which resulted in the decision to which this petition relates.

Writ of certiorari is sought to review the judgment of the Supreme Court of the State of Texas reversing an intermediate court decision and upholding the amended order of the Savings and Loan Commissioner.

OPINIONS BELOW

The amended order of the Savings and Loan Commissioner was entered on January 22, 1975 and is reproduced herein as Exhibit A (p. 25).

The judgment of the District Court of Travis County, Texas, 201st Judicial District, entered on March 23, 1976, upheld the order of the Savings and Loan Commissioner. That judgment is reproduced herein as Exhibit B (p. 56).

The Court of Civil Appeals for the Third Supreme Judicial District of Texas reversed, holding that the trial court, on a record appeal from the agency, had erroneously admitted into evidence for all purposes certain instruments by which the intervenor, respondent here, was permitted to supplement the administrative record with ex parte documents which had not been admitted into evidence at the administrative hearing and were not and could not have been subjected to cross examination in the trial court. The opinion of the Court of Civil Appeals is reported at 547 S.W.2d 710 and is reproduced herein as Exhibit C (p. 59).

The majority of the Supreme Court of Texas reversed, holding that the Savings and Loan Commissioner could properly base an order on instruments accompanying an application the filing of which it found to have been "officially noticed" by the hearing officer. Two justices dissented, pointing to denial of due process, the in-

admissibility of the evidence in the absence of opportunity for cross examination and the confusion as to the burden of proof. The Supreme Court opinions have not been officially reported. The majority opinion is reproduced herein as Exhibit D (p. 69); the dissenting opinion, as Exhibit E (p. 77).

JURISDICTION

The majority decision of the Supreme Court of Texas was entered on January 18, 1978, and made final by order overruling motion for rehearing entered on February 22, 1978. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Was petitioner denied due process of law by the trial court's admitting as evidence of the facts stated therein copies of ex parte documents offered by respondent to supplement a certified administrative hearing record?

2. Does the concept of "official notice" authorize an administrative official to base an order on an application and accompanying documents which were not introduced into evidence at the administrative hearing?

3. Was petitioner deprived of due process of law by an administrative order based upon unsworn, hearsay, ex parte documents which were not offered by the applicant or subjected to cross examination?

4. If the majority of the Supreme Court of Texas was correct in holding that "official notice" could be taken of the contents of ex parte documents filed with an ap-

plication, was petitioner deprived of due process of law by the failure to follow administrative rules and by the institution of a new procedure which had the effect of changing the burden of proof?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment Number Fourteen, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Savings and Loan Act, Article 852a, Revised Civil Statutes of the State of Texas:

Sec. 11.11(4)

"A decision or order adverse to a party who has appeared and participated in a hearing shall be in writing and shall include findings of fact and conclusions of law, separately stated, on all issues material to the decision reached. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

Sec. 11.12

"Any party with an interest in the subject matter thereof who is dissatisfied with any act, order, ruling or decision of the Commissioner taken or made, or with any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission in connection with the administration of this Act, may secure judicial review thereof in the following manner.

. . .

"(4) Service of Process. The petition for review shall be served on the Commissioner and upon all parties of record in any hearing before the Commissioner in respect to the matter for which review is sought or upon the Commissioner alone if the matter for which review is sought is a rule or regulation promulgated in connection with the administration of this Act. After service of such petition upon the Commissioner and within the time permitted for filing an answer, the Commissioner shall certify to the District Court in which such petition is filed the record of the proceedings to which the petition refers. The cost of preparing and certifying such record shall be paid to the Commissioner by the petitioner and taxed as part of the cost in the case, to be paid as directed by the court upon final determination of said cause.

"(5) Trial. . . .

"(b) The review of any other act, order, ruling or decision of the Commissioner or of any rule or regulation shall be tried by the court without a jury in the same manner as civil actions generally and all fact issues material to the validity of the Act, order, ruling, decision or rule or regulation complained of shall be redetermined in such trial on the preponderance of the competent evidence, but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing."[1]

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1. Because of the requirement of separation of powers, Constitution of the State of Texas, Article II, Section 1, the Supreme Court of Texas in *Gerst v. Nixon*, 411 S.W.2d 350 (1967), held invalid that portion of Section 11.12(5)(b) purporting to authorize review to be tried "in the same manner as civil actions generally . . . on the preponderance of competent evidence" but found the provisions of the Act to be severable and to permit review of the Commissioner's certified record under the substantial evidence rule. The initial holding to which reference is made reads (411 S.W.2d 350):

"The provision for judicial review which purports to vest a

Rules and Regulations for Savings and Loan Associations promulgated by the Savings and Loan Section of the Finance Commission of Texas and the Savings and Loan Commissioner:

Rule 1.8

"The purpose of the hearing shall be to accumulate a record of all pertinent information, testimony, records, reports and other data in favor of or opposed to the application upon which the Commissioner shall make his determination of whether the application should be granted or denied. The Commissioner may, in his discretion, make an independent investigation of matters raised in the hearing and in the event he desires to base his decision on any evidence disclosed by such investigation which is not a part of the official record, he shall make the results of such investigation a part of the official record of the hearing and permit all parties to the

court with the power to redetermine upon a preponderance of the evidence basis the issues set forth in art. 852a § 2.08(3), (4) is unconstitutional because it is violative of the separation of powers provision of the Texas Constitution."

The Court's construction of the statute as requiring record appeals reads (411 S.W.2d 357):

"The requirement that the Commissioner file a record of the proceedings had before him with the District Court clearly implies that such record is to be considered by the court. While the last phrase contained in Section 11.12, subsection (5)(b), could have been more artfully worded, it seems reasonably clear that when considered in connection with other portions of the Act, the purpose of the words, 'no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing', was to adopt the rule that the Commissioner's order is to stand or fall upon the evidence adduced and matters noticed at the Commissioner's hearing. It is from this record that the District Judge is to determine whether or not the Commissioner's order is arbitrary, i.e., whether it is reasonably supported by substantial evidence."

hearing an opportunity to be heard in respect thereto by reopening the hearing, if necessary. This shall be done within thirty (30) days after the date of the original hearing."

STATEMENT OF THE CASE

Upon the basis of an administrative hearing record, the Savings and Loan Commissioner of Texas entered his initial order granting charter to City Savings Association. That order was attacked by petitioner and was ultimately found to be invalid in form, in violation of Section 11.11(4) of the Savings and Loan Act.[2] The decision rested primarily upon the fact that the order did not contain underlying facts supporting the statutory language finding relative to financial requisites.[3] The

2. *Security Savings and Loan Association of Dickinson, Texas v. Lewis*, 515 S.W.2d 392 (Tex. Civ. App., Austin, 1974, no writ history).

3. The pertinent portions of the opinion read (Ibid. 393-395):
"As required by art. 852a § 11.11(4), the Commissioner filed findings of fact and conclusions of law. As to compliance by the proposed association with the financial requirements of Art. 852a, the Commissioner found in basically the language of § 2.08(1):
" 'A. The prerequisites, where applicable, set forth in Sections 2.02, 2.03, 2.04, 2.05 and 2.06 of the Savings and Loan Act of Texas have been complied with and the Articles of Incorporation of City Savings Association comply with all other provisions of the Savings and Loan Act of Texas.'
"Sec. 11.11(4) also requires the Commissioner to accompany his findings of fact, if set forth in statutory language, with a 'concise and explicit statement of the underlying facts supporting the findings.' Appellees' claim that the following quoted statement from the Commissioner's order is a 'concise and explicit' statement which satisfies the mandate of Sec. 11.11(4).
" 'In support of the foregoing findings, the Commissioner notes and finds that the application and Articles of Incorporation and the other supporting data filed with the Commissioner in connection with the charter application of City Savings Association and also the testimony of James A. Lammers, proposed President and Chief Executive Officer of City Savings Association, prove

matter was remanded to the Commissioner who, without notice, hearing or reopening the record, entered the The amended order, so entered (Exhibit A, p. 25), was The amended order, so entered (Exhibit A, p. .), was based upon the application for charter and data submitted with the application, instruments which were not verified, never offered in evidence and not subjected to cross examination.

The second action for judicial review, like the first, was brought under the terms of Section 11.12 and was grounded upon contentions that the order was again both invalid in form and lacking support in substantial evidence.[4] The certified hearing record filed by the Commissioner in the district court in conformity with the

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and substantiate the foregoing factors and the Commissioner finds such testimony and evidence to be reliable and credible. None of the protestants to the application offered evidence in any way controverting the factors noted and findings made above.' . . .

"A reading of the above quoted 'underlying facts' plainly demonstrates that such statement is no more than a less than clear reference to evidence said to be found somewhere in the transcript of proceedings of the hearing. The purported 'underlying facts' state that the application and Articles of Incorporation and other supporting data and the testimony of one James A. Lammers 'prove and substantiate' that the statutory prerequisites, where applicable, have been complied with. It may well be that the Commissioner relied upon the recited documents and the testimony of Lammers in reaching his conclusion, but, without question, the quoted statement does not set out what those facts were."

4. *Security Savings and Loan Association of Dickinson, Texas v. Honorable W. Sale Lewis, Savings and Loan Commissioner of Texas, et al.*, No. 230,557 in the 201st District Court of Travis County, Texas, Transcript, 2-10. The initial defendant, the Savings and Loan Commissioner, was a party to the action in the trial court and the Court of Civil Appeals but did not petition for writ of error to the Supreme Court of Texas after the intermediate court held the order invalid.

requirements of Section 11.12(4) did not include the instruments on which the amended order was based—the application for charter or any of the documents submitted with the application. Respondent intervened and, prior to trial, gave notice of its intent to offer into evidence copies of the application and the other documents which had been filed with the Commissioner. The instruments were rank hearsay and clearly should have been objectionable if offered in any court in the United States.

At the initial hearing in the trial court petitioner objected to the admission of the instruments on numerous grounds including that they were hearsay and ex parte and could not be subjected to cross examination and that their admission into evidence would constitute a denial of due process of law.[5] Respondent pled for reception into evidence pointing out with regard to one of the documents that "this one particular instrument which is attached to the application is an integral part of the amended order."[6] The trial court admitted the instruments into evidence "for all purposes"—"for the facts stated therein"[7]—and upon the basis of those documents

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5. *Security Savings and Loan of Dickinson, Texas v. Honorable W. Sale Lewis, Savings and Loan Commissioner of Texas, et al.*, No. 230,557 in the 201st Judicial Court of Travis County, Texas, Statement of Facts (hereinafter S.F.), 11, 21, 23, 24, 36.

6. S.F. 32. That statement was true; the copy of the amended order attached hereto as Exhibit A establishes that 13 separately identified paragraphs (pp. 29, 31-34, 39, 51), purporting to set forth "underlying facts" in support of statutory language findings, as required by Section 11.11(4) of the Act (p. 4 supra), are based upon "data furnished with the application." The instruments contain the only factual material relative to the financial requisites which could be said to distinguish the amended order from the original one, previously held invalid.

7. S.F. 51.

held that the Commissioner's order granting the application for charter was "valid as to form" and "reasonably supported by substantial evidence" (Exhibit B, p. 57).

The Court of Civil Appeals reversed, finding error in the trial court's admission of the documents into evidence and specifically pointing out that "[b]y failing to offer the documents, the applicant waives the right to have the instruments considered, because until their introduction into evidence, the protestants [such as petitioner here] have had no opportunity to cross examine with regard to the materials contained in the documents." The intermediate court further expressed "doubt that the Commissioner could relieve the charter applicant of the burden of establishing its case by competent evidence by officially noticing the *contents* of the application and the accompanying documents" but held that the hearing officer's statement relative to the application was official notice only of the fact of filing and "*not* proof of the statements contained therein" (Exhibit C, pp. 66-67).

The "official notice" contention adopted by the trial court but rejected by the Court of Civil Appeals was accepted by the majority of the Supreme Court of Texas which held that "[t]hrough the process of official notice, the application, including the documents attached to the application as a part of it, becomes a part of the record in the matter" (Exhibit D, p. 72). That interpretation of the hearing officer's statement quoted in the opinion is totally inconsistent with another, but not quoted, statement of the hearing officer where he said:

> "Our procedures are somewhat quasi-judicial in that we attempt to determine all of the facts that are presented and to do it in such form that when, and

> if there is an appeal from the decision of the Commissioner, that the Court will review only the record. This will be the opportunity given to the Applicants and to the Protestants to place any testimony that they desire to place into the record, in order that it might be reviewed by the court, and it might be reviewed by the Commissioner in making his determination."[8]

According to that statement the "evidence" admitted in the trial court through "official notice" was not "evidence" before the Commissioner, but the majority of the Court below has nevertheless held that the instruments were admissible in the trial court both to supply "underlying facts" in the order and to provide substantial evidence in support of the findings made. The majority's position as to the effect of the hearing officer's statement is also contrary to Rule 1.8 of the Rules and Regulations for Savings and Loan Associations, quoted hereinabove (p. 6), and results in placing the burden of proof on the protestant to refute reams of hearsay statements neither offered into evidence nor verified under oath even though in all prior proceedings under the Act the burden of proof had been on the applicant. Moreover, the majority holding is even contrary to the Commissioner's own view of the meaning of the hearing officer's statement. If the Commissioner had considered that the hearing officer was by official notice incorporating the application and accompanying documents into the record, the Commissioner would have included them in the record certified to the district court; he did not do so.

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8. Transcript of Proceedings before the Savings and Loan Department, Austin, Texas in the matter of application for charter City Savings Association, 110 South Highway 3 and Galveston Highway (hereinafter Tr. of Pro.), 6-7.

REASONS FOR GRANTING THE WRIT

I.

The State Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court.

The State Court has held that a hearing officer's statement that "The Commissioner will take official and judicial knowledge of the fact that the application contains all of the prerequisites and that the protests are duly and timely filed in connection with this particular hearing" constituted "the process of official notice" by which "the application, including the documents attached to the application as a part of it, becomes a part of the record in the matter" and that an order based upon facts set forth in the documents so noticed was valid.

(a) This Court has held void an administrative order based upon facts in officially noticed documents not specifically introduced as evidence.

In *United States v. Abilene & S.R. Co.*, 265 U.S. 274 (1924), this Court specifically ruled that, "Nothing can be treated as evidence which is not introduced as such."[9] The holding was made under circumstances, from the procedural standpoint, substantially identical with those in the case at bar. The Interstate Commerce Commission had entered an order which it sought to defend upon the basis of its authority to take official notice of its own

9. 265 U.S. 288.

records,[10] but this Court refused to adopt the administrative contention, pointing out that:

> "It is sought to justify the procedure followed by the clause in rule XIII which declares that the 'Commission will take judicial notice of items in tariffs and annual or other periodical reports of carriers properly on file.' But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. It means that as to these items there is no occasion for the parties to serve copies. The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."[11]

Petitioner here was in the identical position of being confronted with an administrative order containing findings based on instruments which had not been introduced into evidence. In a footnote to the above quoted holding this Court commented on the requirement, explaining that:

> "Its observance will not hamper the Commission in the performance of its duties. For, if the materiality of some fact in a report is not discovered by the

10. The rule provision there relied upon was similar to Section 2.08 of the Texas Savings and Loan Act quoted in the majority opinion (p. 71).

11. 265 U.S. 289.

> Commission until after the close of the hearing, there is power to reopen it for the purpose of introducing the evidence."[12]

The Savings and Loan Commissioner of Texas had the same power under Rule 1.8 quoted hereinabove (p. 6). This Court's final holding on the point in the case then before it reads:

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."[13]

Here it is beyond question that the officially noticed instruments were heavily relied upon by the Commissioner in entering his order.[14] A similar procedure by a different state agency was likewise condemned in *Ohio Bell Telephone Company v. Public Utilities Commission,* 301 U.S. 292 (1937), where it was held that when an order was based upon "evidential facts not spread upon the record," the complaining party had been denied "the fair hearing essential to due process."[15] There, as in the case at bar, the administrative agency and the state court relied upon the power to take official or judicial notice, but this Court again refused to adopt that contention, holding instead that:

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12. Ibid.

13. 265 U.S. 290.

14. As pointed out above and as established by the order itself (Exhibit A, pp. 25-55). 13 paragraphs of underlying facts are based on "data furnished with the application," none of which was introduced into evidence.

15. 301 U.S. 300.

> ". . . notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence § 2567; 1 Greenleaf, Evidence, (16th Ed.) p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' . . . to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."[16]

This Court's continuing adherence to the principles laid down in the decisions discussed above is clearly established by the fact that both were cited in *Goldberg v. Kelly,* 397 U.S. 254 (1970), as authority for the holding that:

> ". . . the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing."[17]

In *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.,* 419 U.S. 281 (1974), reh. den. 420 U.S. 956 (1975), the same two cases were again cited as authority for the statement that:

> "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."[18]

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16. 301 U.S. 301-302.

17. 397 U.S. 271.

18. 419 U.S. 288, Ftn. 4.

Other decisions containing comparable holdings include *Republic Aviation Corporation v. National Labor Relations Board,* 324 U.S. 793 (1945), and *Gonzales v. United States,* 349 U.S. 407 (1955).

(b) The Federal question is substantial.

As has been noted above, the documents which form the basis for 13 paragraphs of underlying facts in the administrative order were not included in the certified record filed in the district court. Their contents are known only because the trial court, over petitioner's vigorous objections, permitted respondent to introduce copies of those documents as evidence in the district court. They were not verified by any witness either at the administrative hearing or in the trial court. No witness was or could have been offered for cross examination in the trial court since Section 11.12 of the Savings and Loan Act, quoted hereinabove (p. 5), has been construed as limiting judicial review to the administrative record.[19] Petitioner, therefore, had no opportunity to cross examine anyone with regard to the documents or their contents.

In *Greene v. McElroy,* 360 U.S. 474 (1959), this Court held that:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . .

19. See Footnote 1 above.

> We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. E. g., Southern R. Co. v. Commonwealth of Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093; Morgan v. United States, 304 U.S. 1, 19, 58 S.Ct. 773, 776, 999, 82 L.Ed. 1129; Carter v. Kubler, 320 U.S. 243, 64 S.Ct. 1, 88 L.Ed. 26; Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63."[20]

After quoting Professor Wigmore on the importance of cross examination, this Court continued:

> "Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally."[21]

20. 360 U.S. 496-497; substantially the same excerpt was quoted in *Goldberg v. Kelly,* 397 U.S. 254, 270 (1970).

21. 360 U.S. 497-499.

That statement is particularly in point in the case at bar in that the documents, copies of which were introduced in evidence in the trial court, were not verified in any manner, not even by affidavit. Clearly the deprivation of a right fundamental to the judicial process and zealously protected by this Court presents a substantial Federal question.

II.

The Court below has decided a Federal question of substance not heretofore decided by this Court.

The majority has held that because of the hearing officer's statement quoted in the opinion, petitioner "had an opportunity to examine, test or challenge this material" or, in other words, that the official notice statement shifted to petitioner, as opponent of the application, the burden to disprove the self serving statements contained in the documents filed in support of the application.

(a) The majority was necessarily deciding a Federal question.

Although there is no mention of due process in the majority opinion itself, that the question was considered and decided is established by the dissent which specifically raised the issue of due process with regard to the procedures approved by the majority (Exhibit E, p. 77).

(b) The Federal question is substantial.

As shown by the quotation in the majority opinion (Exhibit D, p. 72), the "official notice" statement there

relied upon was made as a part of the hearing officer's "introductory remarks." Proceedings on charter applications in the Savings and Loan Department have been held to be quasi-judicial and, at least until the issuance of the majority opinion in the case at bar, have been conducted with the burden of proof on the applicant.[22] The order here in question was based upon a hearing conducted in that manner. Immediately following his statement quoted in the majority opinion, the hearing officer further said:

> "We are going to offer at this time an opportunity for any of the attorneys representing first the Applicant and then the Protestants herein to make any opening statement that they would like to make in connection with this hearing."[23]

The attorney for the applicant, respondent here, made the initial opening statement and thereafter called witnesses and elicited testimony in support of the application.[24] Thereafter petitioner, as opponent of the application, was permitted to present its evidence.[25] All witnesses for either party were offered for cross examination, but at no point in the near 500 page record did the applicant introduce or attempt to introduce into evidence the application itself or any of the data submitted therewith. Neither did the hearing officer, after his "introductory remarks," make any further reference to "official

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22. *Lewis v. Guaranty Federal Savings and Loan Association*, 483 S.W.2d 837 (Tex. Civ. App., Austin, 1972, writ refused, n.r.e.).

23. Tr. of Pro., 8.

24. Tr. of Pro., 10-390.

25. Tr. of Pro., 391-471.

notice." Nevertheless the majority has held that the statement made by the hearing officer at the beginning of the hearing provided petitioner with an opportunity to examine, test and challenge the material. The data furnished with the application, if accepted as true, makes a prima facie case for the granting of the charter.[26] The manner in which all prior savings and loan hearings had been conducted and the manner in which the particular hearing here was conducted gave petitioner no reason to believe that it had cause to respond to anything not specifically offered in evidence, but the majority, nevertheless, has held that by the process of official notice the burden of proof was transfered to petitioner who then became obligated either to accept or to disprove the self-serving declarations contained in the application and supporting data.

Since this Court has never condoned the use of official notice by mere reference to provide basis for specific fact findings in administrative orders, it has not had occasion to rule upon the question of whether official notice of documents supporting the position of one party can shift the burden of proof from that party to its opponent. It is petitioner's position, however, that such a shift in the burden of proof is patently a denial of due process in that it necessarily implies that the hearing officer becomes the advocate for the party whose documents are officially noticed and, therefore, ceases to be an unbiased trier

26. The four statutory requisites for the granting of a charter are listed in the majority opinion (Exhibit D, p. 69 at p. 71). The instruments furnished with the application were utilized by the Commissioner for underlying facts in support of each of the findings made in statutory language (Exhibit A, p. 25 at pp. 29, 31-34, 39, 51), and are substantially the only source of underlying facts for the first statutory requisite for the granting of an application.

of fact. In *Withrow v. Larkin,* 421 U.S. 35 (1975), this Court held that:

> " . . . a 'fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This applies to administrative agencies which adjudicate as well as to courts. Bigson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973). Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness."[27]

Moreover, parties are entitled to know the issues on which each has the burden of proof. That proposition was clearly recognized by this Court in *Del Vecchio v. Bowers,* 296 U.S. 280 (1935). That case involved a presumption created by statute rather than official notice, but the situations are closely parallel. The holding in point reads:

> "The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this prima facie. . . . Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence."[28]

27. 421 U.S. 46.

28. 296 U.S. 286.

By applying that ruling to the case at bar, it becomes clear that even if the "official notice" had the effect of a statutory presumption, petitioner's offering of contrary evidence should have caused the official notice to "fall out of the case."

III.

The case merits the attention of this Court.

The concepts and functions of official notice are matters of universal concern, particularly when the concept attempts to embrace unverified, non-specific, inadmissible material not tested by any rule of evidence. The improper use of "official notice" in this case threatens every person who has contact with administrative law. Although this case was decided under the Texas Savings and Loan Act, the provisions for judicial review contained therein were based on the revised Model State Administrative Procedure Act (1961) and have been repeated in substantially identical language in the Administrative Procedure and Texas Register Act, Article 6252-13a of the Revised Civil Statutes of Texas. All versions of the model acts contain similar language with regard to official notice, and the model acts, if not adopted verbatim, have been widely utilized as patterns in many states. Model acts, rules of evidence, right to counsel, burden of proof—due process requirements—would be mocked by the long secret arm of the kind of "official notice" sanctioned by the Court below.

It is a matter of common knowledge that decisions of the highest court of one state are often highly persuasive in the courts of other states particularly with regard to construction and application of similarly worded statutes.

One incorrect decision is, therefore, capable of producing many more. In this regard the situation here is comparable with that which caused this Court to grant certiorari in the Del Vecchio case discussed above. It involved a District of Columbia statute, not under ordinary circumstances reviewed by this Court, but because the act was national in scope and a decision with respect to its enforcement would constitute a precedent of general application, certiorari was granted and the judgment reversed. A similar correction of the basic errors in the state court judgment here is clearly appropriate. Only this Court can give to the term, official notice, proper definition and limitations.

CONCLUSION

Administrative decisions, as a group, affect the lives of more citizens of this nation than do those of any other category of judicial or quasi-judicial determinations. A harmful precedent should not be permitted to stand.

PRAYER

Petitioner, therefore, prays that this petition for writ of certiorari be granted.

Respectfully submitted,

Of Counsel:

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for writ of certiorari on counsel for respondent by depositing same in the United States mail, postage prepaid, on May _____, 1978, addressed to Mr. Charles Price, 508 First City National Bank Building, Houston, Texas 77002; Mr. Lowell B. Hayes, Baker & Heard, 1300 First City National Bank Building, Houston, Texas 77002; and Mr. Robert J. Hearon, Graves, Daugherty, Hearon, Moody & Garwood, P. O. Box 98, Austin, Texas 78767, attorneys for respondent.

MARY JOE CARROLL

EXHIBIT A

IN RE: CITY SAVINGS ASSOCIATION
LEAGUE CITY,
GALVESTON COUNTY, TEXAS
APPLICATION FOR CHARTER

BEFORE THE SAVINGS AND LOAN
COMMISSIONER OF THE STATE OF TEXAS
AUSTIN, TRAVIS COUNTY, TEXAS

AMENDED ORDER

BE IT REMEMBERED that, on the 24th day of October, 1972, an application for a charter for a savings and loan association to be named City Savings Association and whose principal office is to be located at 110 State Highway 3, League City, Galveston County, Texas, was filed by the incorporators of such proposed Association at the office of the Savings and Loan Commissioner of the State of Texas. Whereupon, the Savings and Loan Commissioner found and concluded that such application met and complied with each and all of the requirements thereon promulgated by the Texas Savings and Loan Act and by the Rules and Regulations for Savings and Loan Associations.

Thereupon, the Savings and Loan Commissioner set a date for hearing on such application; caused public notice of such application to be given; and duly and timely mailed notice of such hearing by certified mail to all State and Federal Savings and Loan Associations located in

Galveston County, said County being the County of the proposed location of the principal office of said applicant association.

Thereafter, the proposed incorporators of applicant association published at least twenty (20) days before the date of the hearing on such application in a newspaper printed in the English language of general circulation in Galveston County, Texas, notice of the filing of such application and of the time and place for the hearing on such application. And, the Savings and Loan Commissioner found and concluded that such notice and the form thereof met and complied with each and all of the requirements thereon of Section 1.4 of the aforementioned Rules and Regulations. In this connection, the Savings and Loan Commissioner found and concluded, also, that such proposed incorporators duly and timely filed with the Savings and Loan Commissioner proof of publication of the aforesaid notice required by Section 1.4 of the said Rules and Regulations, all pursuant to and as prescribed by Section 1.6 of said Rules and Regulations.

Thereafter, and more than ten (10) days before such hearing date on said application, the Savings and Loan Commissioner received written notices of intention to appear in person or by attorney to protest said application from Security Savings and Loan Association, Mainland Savings Association and Cullen Savings Association.

Thereafter, on the 13th day of February, 1973, came on for hearing before the Savings and Loan Commissioner the application for a charter for a savings and loan association to be named City Savings Association and whose principal office is to be located in League City,

Galveston County, Texas; and came the Applicants and all three Protestants, each in person and by and through counsel, and each and all of them announced ready for such hearing.

Whereupon, beginning on February 13, 1973, and concluding on February 15, 1973, the said parties adduced evidence at such hearing in support of such application, on the one hand, and in opposition to such application, on the other hand, before the Hearing Officer, all pursuant to Section 2.08 of the Texas Savings and Loan Act and Section 1.8 of the Rules and Regulations for Savings and Loan Associations.

The Savings and Loan Commissioner, after giving due and careful consideration to the data furnished with the application, the evidence adduced at such hearing and his official records affirmatively found that:

1. The prerequisites, where applicable, set forth in Section 2.02 of the Texas Savings and Loan Act have been complied with;

2. The prerequisites, where applicable, set forth in Section 2.03 of the said Act have been complied with;

3. The prerequisites, where applicable, set forth in Section 2.04 of the said Act have been complied with;

4. The prerequisites, where applicable, set forth in Section 2.05 of the said Act have been complied with;

5. The prerequisites, where applicable, set forth in Section 2.06 of the said Act have been complied with;

6. Applicant's articles of incorporation comply with all other provisions of said Act;

7. The character, responsibility and general fitness of the persons named in Applicant's articles of incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of the Texas Savings and Loan Act;

8. The proposed association will have qualified full-time management (the term "qualified full-time management" being defined in Section 1.11 of the Rules and Regulations for Savings and Loan Associations, as follows: "A person shall be prima facie qualified if he is currently managing a savings and loan association in this State, or if at the date of filing an application he shall have had, next preceding such date, at least three consecutive years of practical experience in the executive management of a savings and loan association in this State; . . . .");

9. There is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation (the term "community" being defined in Section 1.10 of the Rules and Regulations for Savings and Loan Associations, as follows: ". . . that geographical area so situated with respect to the proposed location that persons residing in such area could patronize the proposed office in the ordinary course of their business"); and

10. The operation of the proposed association will not unduly harm any existing association.

The underlying facts supporting finding of fact number 1, above, are as follows:

a. The data furnished with the application, to-wit, the Application, the By-Laws and the Articles of Incorporation declare and evidence the fact that Applicant's charter provides for the issuance of Permanent Reserve Fund Stock. Paragraph 3 of the Application contains a declaration that Applicant shall issue Permanent Reserve Fund Stock. Paragraph 4 of "General Provisions" of Applicant's By-Laws declares that Applicant shall issue Permanent Reserve Fund Stock. Paragraph 3 of Applicant's Articles of Incorporation declares that Applicant shall issue Permanent Reserve Fund Stock.

b. The testimony of the witness, James A. Lammers, that Applicant will be a Permanent Reserve Fund Stock association (Hearing on Application, p. 15).

c. No evidence was adduced upon such hearing to the effect that any portion of such stock had been or was being retired or withdrawn.

d. The data furnished with the application, to-wit, paragraph 4 of Applicant's By-Laws declares that such stock shall not be retired or withdrawn except in the manner prescribed by law.

e. The data furnished with the Application, to-wit, paragraph 3 of the Application and paragraph 3 of Applicant's Articles of Incorporation declare and evidence the fact that Applicant is authorized to issue 25,000 shares of Permanent Reserve Fund Stock, each of the par value of $10.00, being a total of $250.000 authorized Permanent Reserve Fund Stock.

f. The data furnished with the Application, to-wit, paragraph 3 of the Application declares and evidences

the fact that such Permanent Reserve Fund Stock in the total amount of $250,000 has been fully paid for in cash in advance of issuance.

g. The testimony of the witness, James A. Lammers, that such Permanent Reserve Fund Stock in the total amount of $250,000 has been fully subscribed and fully paid for in cash (H. on Appl., p. 20).

h. The testimony of the witness, James A. Lammers, that the cash consideration paid for such stock subscriptions, to-wit, $250,000 is on deposit at Capital National Bank, Houston, Texas (H. on Appl., p. 20).

i. No evidence was adduced upon such hearing to the effect that Applicant had made any loans against such Permanent Reserve Fund Stock.

j. The testimony of the witness, James A. Lammers, that such Permanent Reserve Fund Stock consists of 25,000 shares, each having a par value of $10.00 (H. on Appl., p. 20).

k. The stipulation of all parties that the witness, James A. Lammers, possesses the qualifications and business experience to qualify him as a manager of a savings and loan association (H. on Appl., pp. 13-14).

l. The conclusion or opinion of the witness, James A. Lammers, received without objection, that the prerequisites, where applicable set forth in Section 2.02 of the Texas Savings and Loan Act have been complied with by Applicant (H. on Appl. pp. 15-16).

The underlying facts supporting finding of fact number 2, above, are as follows:

a. The data furnished with the application, to-wit, paragraph 3 of Applicant's Articles of Incorporation and paragraph 3 of "General Provisions" of Applicant's By-Laws declare and evidence the fact that Applicant's incorporators shall have authority to issue Permanent Reserve Fund Stock.

b. The testimony of the witness, James A. Lammers, that Applicant will be a Permanent Reserve Fund Stock association (H. on Appl., p. 15).

c. The data furnished with the application, to-wit, paragraph 3 of the Application declares and evidences the fact that Applicant's incorporators have caused to be subscribed for and paid for in cash to the credit of Applicant association Permanent Reserve Fund Stock in an aggregate amount of $250,000.

d. The testimony of the witness, James A. Lammers, that Permanent Reserve Fund Stock in an aggregate amount of $250,000 has been fully subscribed and fully paid for in cash to the credit of the proposed association (H. on Appl., p. 20).

e. The stipulation of all parties that the witness, James A. Lammers, possesses the qualifications and business experience to qualify him as a manager of a savings and loan association (H. on Appl. pp. 13-14).

f. The conclusion or opinion of the witness, James A. Lammers, received without objection, that the prerequisites, where applicable, set forth in Section 2.03 of the Texas Savings and Loan Act have been complied with by Applicant (H. on Appl., pp. 15-16).

The underlying facts supporting finding of fact number 3, above, are as follows:

a. The data furnished with the application, to-wit, paragraph 3 of Applicant's Articles of Incorporation and paragraph 3 of "General Provisions" of Applicant's By-Laws declare and evidence the fact that the proposed association shall have authority to issue Permanent Reserve Fund Stock.

b. The testimony of the witness, James A. Lammers, that the proposed association will be a Permanent Reserve Fund Stock association (H. on Appl., p. 15).

c. The official records of the Savings and Loan Commissioner evidence the fact that the Commissioner required of Applicant incorporators a paid-in surplus of $62,500 as a prerequisite to the approval of such application.

d. The data furnished with the application, to-wit, paragraph 3 of the Application for Charter evidences the fact that Applicant's incorporators have met and complied with the requirement of the Commissioner that Applicant have a paid-in surplus of $62,500.

e. The testimony of the witness, James A. Lammers, that Applicant has a paid-in surplus of $62,500 (H. on Appl., p. 20).

f. The stipulation of all parties that the witness, James A. Lammers, possesses the qualifications and business experience to qualify him as a manager of a savings and loan association (H. on Appl., pp. 13-14).

g. The conclusion or opinion of the witness, James A. Lammers, received without objection, that the prerequisites, where applicable, set forth in Section 2.04 of the Texas Savings and Loan Act have been complied with by Applicant (H. on Appl., pp. 15-16).

The underlying facts supporting findings of fact numbers 4 and 5, above, are as follows:

a. The data furnished with the application, to-wit, the Application for Charter, the By-Laws and the Articles of Incorporation declare and evidence the fact that Applicant's charter provides for the issuance of Permanent Reserve Fund Stock. Paragraph 3 of the Application for Charter contains a declaration that Applicant shall issue Permanent Reserve Fund Stock. Paragraph 4 of "General Provisions" of Applicant's By-Laws declares that Applicant shall issue Permanent Reserve Fund Stock. Paragraph 3 of Applicant's Articles of Incorporation declares that Applicant shall issue Permanent Reserve Fund Stock.

b. The testimony of the witness, James A. Lammers, that Applicant will be a Permanent Reserve Fund Stock association (H. on Appl., p. 15).

The underlying facts supporting finding of fact number 6, above, are as follows:

a. The data furnished with the application, to-wit, Applicant's Articles of Incorporation contains (1) the name of the proposed association (City Savings Association), (2) the site of the proposed association's principal office (League City, Galveston County, Texas) and (3) the names and addresses of its initial directors (Jack Apple, 21 Carolane Trail, Houston, Texas 77024; Johnnie Arolfo, Jr., 135 Englewood Drive, League City, Texas 77573; Rex Bailey, 2117 Savanna Courts, League City, Texas 77573; Robert W. Hervey, 3382 DelMonte Drive, Houston, Texas 77019; James A. Lammers, 3530 Pinemont, Houston, Texas 77018; Jack Rowe, 1600 East Main Street, League City, Texas 77573; and Raymond

Schindler, 17 Westlane, Houston, Texas) and, such Articles of Incorporation was duly verified by the incorporators, all as required by Section 2.01(1) and (4) of the Texas Savings and Loan Act.

b. The conclusion or opinion of the witness, James A. Lammers, received without objection, that Applicant's Articles of Incorporation comply with all other provisions of the Texas Savings and Loan Act (H. on Appl., p. 16).

The underlying facts supporting finding of fact number 7, above, are as follows:

a. The persons named in Applicant's Articles of Incorporation (such Articles of Incorporation being part of the data furnished with the application) are Jack Apple; Johnnie Arolfo, Jr.; Rex Bailey, Robert W. Hervey; James A. Lammers; Jack Rowe; and Raymond Schindler.

b. The testimony of the witness, James A. Lammers, that he is acquainted with and knows the persons named in the Articles of Incorporation (H. on Appl., p. 16).

c. The testimony of the witness, James A. Lammers, that Jack Apple has been in the automobile business for a number of years and that Jack Apple was vice-president of South Main State Bank for a number of years (H. on Appl., p. 17).

d. The testimony of the witness, James A. Lammers, that Johnnie Arolfo, Jr., is the son of the Mayor of League City and that Mr. Arolfo, Jr., is a construction superintendent (H. on Appl., p. 17).

e. The testimony of the witness, James A. Lammers, that Rex Bailey is either the general manager or the

supervisor of General Telephone Company for the League City area (H. on Appl., p. 17).

f. The testimony of the witness, James A. Lammers, that Robert W. Hervey is a director of Harrisburg National Bank; that Mr. Hervey has been a director of Spring Branch Savings and Loan Association since about 1958; that Mr. Hervey has had much business experience doing business as Hervey's Boat World and C. D. Del Home Boat Company in Houston; and that Mr. Hervey was an incorporator of and a director of Union National Bank in Houston (H. on Appl., pp. 16-18).

g. The stipulation of all parties that the witness, James A. Lammers, possesses the qualifications and business experience to qualify him as a manager of a savings and loan association (H. on Appl., pp. 13-14).

h. The testimony of the witness, James A. Lammers, that he (Lammers) was executive vice-president of Spring Branch Savings and Loan Association, Houston, Texas, from 1958 to 1972 and that he (Lammers) had been in the heavy equipment rental business from 1972 to 1973 (H. on Appl., pp. 10-11).

i. The testimony of the witness, James A. Lammers, that Jack Rowe is the owner of the funeral home in League City and that Mr. Rowe had been president of the Chamber of Commerce in the League City area (H. on Appl., p. 17).

j. The testimony of the witness, James A. Lammers, that Raymond Schindler is in the steel business; that Mr. Schindler is the leader in Channel 26 TV Station in Houston; that Mr. Schindler was an incorporator of and a director of Union National Bank in Houston; and that

Mr. Schindler is involved in a number of other enterprises (H. on Appl., pp. 16-18).

k. The conclusion or opinion of the witness, James A. Lammers, received without objection, that the character, responsibility and general fitness of the persons named in the Articles of Incorporation are such as to command confidence and warrant belief that the business of Applicant, City Savings Association, will be honestly and efficiently conducted in accordance with the intent and purpose of the Texas Savings and Loan Act (H. on Appl., p. 18).

l. The testimony of the witness, Johnny Arolfo, that he (Arolfo) is and has been since 1962 Mayor of League City, Texas (H. on Appl., pp. 53-54).

m. The testimony of the witness, Johnny Arolfo, that he knows the persons named in Applicant's Articles of Incorporation and is acquainted with their business abilities and character (H. on Appl., pp. 54-55).

n. The conclusion or opinion of the witness, Johnny Arolfo, received without objection, that the character, responsibility and general fitness of the persons named in Applicant's Articles of Incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of the Texas Savings and Loan Act (H. on Appl., p. 55).

The underlying facts supporting finding of fact number 8, above, are as follows:

a. The official records of the Savings and Loan Commissioner of Texas evidence the fact that the application

of City Savings Association was filed with the Savings and Loan Commissioner on October 24, 1972.

b. The testimony of the witness, James A. Lammers, that he will be president and chief executive officer of Applicant, City Savings Association (H. on Appl., p. 18).

c. The testimony of the witness, James A. Lammers, that he was executive vice-president and chief executive officer of Spring Branch Savings and Loan Association, Houston, Texas, from 1958 to June, 1972 (H. on Appl., p. 11).

d. The stipulation of all parties that the witness, James A. Lammers, possesses the qualifications and business experience to qualify him as a manager of a savings and loan association (H. on Appl., pp. 13-14).

e. The conclusion or opinion of the witness, James A. Lammers, received without objection, that the proposed association will have qualified full-time management (H. on Appl., p. 18).

The underlying facts supporting finding of fact number 9, above, are as follows:

a. The testimony of the witness, James A. Lammers, that:

(1) The location of the proposed association will be 110 State Highway 3, League City, Galveston County, Texas (H. on Appl., pp. 14-15).

(2) Applicant association will offer all of the savings and loan services which are authorized by statutes and the Rules and Regulations for Savings and Loan Associations (H. on Appl., p. 19).

(3) The shareholders of the proposed association will be primarily people from the League City area (H. on Appl., pp. 20-21).

(4) Applicant association would receive $1,200,000 in loans during the first year of operation; that such loans would produce income (interest) in the amount of $90,-000; that applicant association would receive mortgage loan service charges in the amount of $24,000 in the first year of operation; that applicant association would receive interest on liquid assets in the amount of $5,500 in the first year; and that applicant association would receive $10,000 income from consumer loans in the first year (H. on Appl., pp. 26-28).

(5) The proposed association could expect to have $1,000,000 in savings upon opening for business and $2,000,000 in savings by the end of the first year of operation (H. on Appl., p. 29).

(6) The proposed association could expect to have $4,000,000 in savings at the end of the second year and $3,000,000 in loans at the end of the second year (H. on Appl., pp. 29-30).

(7) The proposed association could expect to have $5,000,000 in loans at the end of the third year of operations (H. on Appl., p. 30).

(8) The proposed association will primarily serve the League City community; but, its services would not be limited to that area; and, it anticipates obtaining savings from wherever it can get them (H. on Appl., pp. 34-35).

(9) Most of the proposed association's loans would be residential loans at an interest rate of 7.5% or more;

and, it will make both interim (construction) loans and permanent (mortgage) loans (H. on Appl., p. 42).

(10) The stipulation of all parties that the witness, James A. Lammers, possesses the qualifications and business experience to qualify him as a manager of a savings and loan association (H. on Appl., pp. 13-14).

b. The data furnished with the application, to-wit, the instrument entitled "City Savings Association—League City, Texas—Projected Income and Expense" shows that the proposed association expects to have a net loss of $6,770 in its first year of operation; net income of $36,300 in its second year of operation; and net income of $97,900 in its third year of operation.

c. Forty-eight (48) photographs in the form of slides made on and after January 29, 1973 showing: slides 1 through 10, applicant's incorporators and some of the proposed shareholders; slide 11, new Civic Center in League City; slide 12, City Hall of League City; slide 13, League City Library; slide 14, League City Council Chamber and Corporation Court; slide 15, the old City Hall; slide 16, the new shopping center at State Highway 3 and West Main Street in League City (which shows the site of the proposed savings and loan association); slide 17, new Catholic Church; slide 18, four fire trucks; slide 19, Ross Elementary School; slide 20, another elementary school; slide 21, Rowe Funeral Home; slide 22, Pecan Forest Section 2, a new subdivision in League City; slide 23, another picture of the same subdivision; slide 24, 1800 acres purchased by U. S. Homes for development; slide 25, new General Telephone Company office (to be added on to during 1974); slide 26, townhouse apartments in League City (90 units; and it has a waiting list);

slide 27, Galveston County Park (80-85 acres on Clear Lake); slide 28, League City Police Department; slide 29, a League City truck farm; slide 30, intersection of State Highway 3 and FM 518 (area of the proposed savings and loan association); slide 31, Clear Creek High School in League City; slide 32, administration building of Clear Creek Independent School District in League City; slide 33, Humble tank farms and Houston Light and Power Company (just outside city limits of League City); slide 34, an aerial photograph of location of the proposed savings and loan association; slide 35, field house, auditorium and football field of Clear Creek High School; slide 36, Pecan Forest Section 1, a subdivision in League City; slide 37, League City State Bank and Security Savings and Loan Association offices; slide 38, Newport subdivision; slide 39, another photograph of Newport subdivision; slide 40, Clear Creek Village subdivision (with homes up to $75,000); slide 41, Glen Cove subdivision in League City; slide 42, Bayou Brae subdivision (170-180 homes) and location where 220 townhouses are to be built, soon; slide 43, Ideal Cement Company development, including digging of canals; slide 44, Watergate Marina on Clear Lake; slide 45, another section of Newport subdivision; slide 46, Clear Lake area facing Glen Cove; slide 47, Watergate Marina, taken from opposite direction; and slide 48, another photograph of shopping center and site of the proposed savings and loan association. Applicant's Exhibit No. 1 (H. on Appl., pp. 56-81).

d. The stipulation of all parties that the witness, Dr. William A. Blachman, possesses the necessary educational, business and professional experience that would qualify him to testify as an expert witness in the hearing on this

application in the field of economics and marketing (H. on Appl., pp. 126-127).

e. The testimony of the witness, Dr. William A. Blachman, that:

(1) The primary trade area which the proposed association would serve is that which has been delineated in red on a map of the Houston-Galveston area; that the location of the proposed association is that which has been delineated by a dot in approximately the middle of such map; and that the primary trade area so delineated on such map is a close approximation of the city limits of League City. Applicant's Exhibit No. 2 (H. on Appl., pp. 131-133).

(2) A larger or general area which the proposed association would serve is that which has been delineated in blue on a map of the Clear Lake area; and such delineation in blue on that map represents the boundaries of the Clear Creek Independent School District. Applicant's Exhibit No. 3 (H. on Appl., pp. 130; 133-135; 148).

(3) The Clear Creek Independent School District includes the incorporated communities of Clear Lake Shores, El Lago, Kemah, League City, Nassau Bay, Seabrook, Taylor Lake and Webster; the residential area known as Clear Lake City; the industrial developments at Bayport; and the Manned Spacecraft Center. Applicant's Exhibit No. 3 (H. on Appl., pp. 133-135).

(4) The boundaries of 1970 U.S. Census tracts numbers 1203, 1204, 1205, 1206 and 1207 have been delineated on the map of the Clear Lake area with black lines; and such Census tracts cover approximately 35 square

miles. Applicant's Exhibit No. 3 (H. on Appl., 135-136; 143).

(5) All of Census tracts 1203, 1204, 1205, 1206 and 1207, except 1206, are totally within the city limits of League City. Applicant's Exhibit No. 3 (H. on Appl., pp. 135-136).

(6) League City is an integral part of the larger Clear Lake area because it is connected from north to south by both State Highway 3 and the Gulf Freeway. Applicant's Exhibit No. 3 (H. on Appl., p. 136).

(7) There was a 233.79 per cent increase in electrical connections for League City during the period 1960-1972. Applicant's Exhibit No. 7 (H. on Appl., p. 142).

(8) There was a decline of the NASA influence in the area in about 1969; but, the area has shown a steady four per cent (4%) growth per annum since 1970 (H. on Appl., pp. 143-144).

(9) The locations of the five (5) existing savings and loan association facilities in the Clear Creek area have been delineated on a map of the area with blue dots; the locations of the five (5) existing banks in the Clear Creek area have been delineated on such map with red dots; and the site of the proposed savings and loan association has been delineated thereon with an unnumbered dot. Applicant's Exhibit No. 4 (H. on Appl., 144-150).

(10) There is only one existing savings and loan association facility in the primary trade area of the proposed savings and loan association; and that one existing facility is an office of Security Savings and Loan Association (H. on Appl., p. 145).

(11) There is only one existing bank within such primary trade area; and that one bank is the League City State Bank (H. on Appl., p. 146).

(12) The enrollment of the Clear Creek Independent School District was 2,000 students in 1961; in 1965 the enrollment was 4,300 students; in 1971 there were 11,829 students; and in 1972 there were 13,203 students. Applicant's Exhibit No. 8 (H. on Appl., pp. 150-152).

(13) The locations of ten (10) residential subdivisions and fourteen (14) apartment projects in League City are delineated on a map of the area. Applicant's Exhibit No. 5 (H. on Appl., pp. 159-161).

(14) Table B, attached to Applicant's Exhibit 5, shows that the total number of residential units including 1,250 from areas other than those ten (10) subdivisions is 2,613 and that the total number of apartment units is 413. Applicant's Exhibit No. 5 (H. on Appl., pp. 159-161).

f. The testimony of the witness, Dr. John J. Brosky, that:

(1) He is Professor of Finance at the University of Houston (H. on Appl., p. 193).

(2) He is and has been a consultant for several Houston banks; for National Association of Credit Management; for Credit Research Foundation; for Graduate School of Credit and Financial Management at Dartmouth and Stanford; for Washington State Consumer Finance Association; for National Consumer Finance Association; for Arizona State Consumer Finance Association; and for Oregon Consumer Finance Association (H. on Appl., p. 194).

(3) He has performed about ten (10) economic feasibility studies in connection with applications for savings and loan associations and banks (H. on Appl., pp. 194-195).

(4) He received his Ph.D. degree in Finance, Economics and Statistics from the University of Texas in 1961 (H. on Appl., p. 193).

(5) He (Dr. Brosky) agreed with the primary and secondary trade areas of the proposed savings and loan association as previously delineated by Dr. Blachman (H. on Appl., p. 197).

(6) Eight per cent (8%) of Galveston County's population is in U.S. Census tracts 1203, 1204, 1205, 1206 and 1207; that ninety-three per cent (93%) of the population in those five (5) census tracts is white; that eighteen per cent (18%) of the population in those five (5) census tracts are in the 25-34 year old age group, such age group being the one which purchases more durable goods and borrows more than any other age group; and that almost forty per cent (40%) of the persons in such primary trade area are less than 35 years old, meaning that such area has an emerging type of potential borrowers coming up through the ranks. Applicant's Exhibit No. 10 (H. on Appl., pp. 199-202).

(7) There was only 1.1% unemployment in League City at the time of the 1970 U.S. Census, far below the national average; that eighty-six per cent (86%) of the males sixteen years of age and over were part of the labor force in League City; and only seventy-nine per cent (79%) of the males in that age group were part of the County labor force. Applicant's Exhibit No. 11 (H. on Appl., p. 203).

(8) The professional and technical level of employment in League City in 1970 was thirty per cent (30%) of the total employed population sixteen years of age and older, which is a heavy concentration in the higher income groupings; and the percentage for Galveston County was only seventeen per cent (17%). Applicant's Exhibit No. 12 (H. on Appl., pp. 203-205).

(9) Service workers constitute thirteen per cent (13%) of the labor force in the County and only five per cent (5%) in the primary trade area of the proposed savings and loan association, the significance being that service workers are less rewarded financially than are professional and technical people. Applicant's Exhibit No. 12 (H. on Appl., pp. 203-205).

(10) The County has six per cent (6%) "laborers, except farm" and the primary trade area of the proposed association has only four per cent (4%); again, the significance being that this class is less rewarded than professional and tehnical people. Applicant's Exhibit No. 12 (H. on Appl., pp. 203-205).

(11) Twenty-six per cent (26%) of the primary trade area work force was in manufacturing in 1970 and only twenty per cent (20%) of the County labor force was in manufacturing, the significance being that manufacturing is one of the most lucrative types of work from the standpoint of remuneration. Applicant's Exhibit No. 13 (H. on Appl., pp. 205-206).

(12) The primary trade area had ten per cent (10%) of the labor force employed in public administration and the County had only five per cent (5%). Applicant's Exhibit No. 13 (H. on Appl., pp. 205-206).

(13) The mean family income for the primary trade area in 1970 was $12,483, while the mean family income for the County was only $10,590 and the national mean income was $10,200; and that "mean income" is the same as average income, while the median number separates the lower fifty per cent (50%) from the higher fifty per cent (50%). Applicant's Exhibit No. 14 (H. on Appl., pp. 206-209).

(14) Forty-eight per cent (48%) of the people in Galveston County were making in excess of $10,000 in 1970, while sixty-six per cent (66%) of the people in the primary trade area of the proposed association were making $10,000 or more annually. Applicant's Exhibit No. 14 (H. on Appl., pp. 206-209).

(15) Four per cent (4%) of the families in the County were receiving some form of public welfare in 1970, while only two per cent (2%) of the families in the primary trade area were receiving such welfare. Applicant's Exhibit No. 15 (H. on Appl., pp. 209-211).

(16) In the County eleven per cent (11%) of the population was at or below the poverty level as the federal government defines it in 1970, while only six per cent (6%) in the primary trade area were below the poverty level. Applicant's Exhibit No. 15 (H. on Appl., pp. 209-211).

(17) The primary trade area had sixty-seven per cent (67%) owner-occupied homes in 1970 and the County had only fifty-four per cent (54%). Applicant's Exhibit No. 16 (H. on Appl., pp. 211-213).

(18) The vacancy rate in the County was fourteen per cent (14%) in 1970 and it was only nine per cent

(9%) in the primary trade area. Applicant's Exhibit No. 16 (H. on Appl., pp. 211-213).

(19) Seventeen per cent (17%) of the owner-occupied homes in the primary trade area were in the $20,000-$25,000 value range in 1970 and only five per cent (5%) of such homes in the County were in that value range. Applicant's Exhibit No. 16 (H. on Appl., pp. 211-213).

(20) Fourteen per cent (14%) of such homes in the primary trade area were in the $15,000-$20,000 value range in 1970, while only nine per cent (9%) of the County homes were in that value range. Applicant's Exhibit No. 16 (H. on Appl., pp. 211-213).

(21) Thirty-two per cent (32%) of the housing units in Galveston County in 1970 were rent houses and only twenty-three per cent (23%) of the houses in the primary trade area were rent houses, the significance being more stability and fewer transients in the primary trade area. Applicant's Exhibit No. 17 (H. on Appl., pp. 213-214).

(22) The rental units in the primary trade area in 1970 were of a signifiantly higher quality than those in the County. Applicant's Exhibit No. 17 (H. on Appl., pp. 213-214).

(23) In the County, only twenty-two per cent (22%) of the rent houses rented for $100 a month or above in 1970, while fifty-four per cent (54%) of the rent houses in the primary trade area were renting for $100 or more. Applicant's Exhibit No. 17 (H. on Apply., pp. 213-214).

(24) There are more apartment dwellers in the County than there are in the primary trade area, the signifi-

cance being that apartment dwellers are more transient in nature. Applicant's Exhibit No. 18 (H. on Appl., pp. 215-216).

(25) Insofar as ages of the homes is concerned, in the County eighteen per cent (18%) of the single-unit structures were built between 1965 and 1970 and in the primary trade area thirty-seven per cent (37%) were built in that same five-year period. Applicant's Exhibit No. 18 (H. on Appl., pp. 215-216).

(26) His study of two banks on the periphery of the primary trade area showed that their time and savings deposit growth has far outdone their asset and demand deposit growth, the significance being that if a savings and loan association had been out seeking these funds it would have gotten much of it. Applicant's Exhibit No. 19 (H. on Appl., pp. 218-220).

(27) His study of the League City State Bank, which is in the primary trade area showed a seventy-seven per cent (77%) growth in assets from 1968 to 1972 and a twenty-two per cent (22%) growth from 1971 to 1972; and at League City State Bank time and savings deposits increased four (4) times as much as demand deposits during the period of 1968 to 1972. Applicant's Exhibit No. 20 (H. on Appl., pp. 220-222).

(28) Webster State Bank, which is just outside of the primary trade area had a fifty-three per cent (53%) growth in assets from 1968 to 1972. Applicant's Exhibit No. 20 (H. on Appl., pp. 220-222).

(29) From 1967 to 1972, Cullen Savings Association (just outside of the primary trade area) had a 153% increase in mortgage loans, a 186% increase in assets

and a 163% increase in savings; and that its rate of growth is about nine (9) times the national rate of growth. Applicant's Exhibit No. 21 (H. on Appl., pp. 222-225).

(30) From 1967 to 1971, Security Savings and Loan Association (with a branch office within the primary trade area, to-wit, in League City) had an increase of thirty-nine per cent (39%) in mortgage loans, a forty-nine per cent (49%) increase in savings and a forty-two per cent (42%) increase in assets; and that from 1971 to 1972, Security Savings and Loan Association had a twenty per cent (20%) increase in mortgage loans, a thirty-one per cent (31%) increase in savings and a nineteen per cent (19%) increase in assets. Applicant's Exhibit No. 21 (H. on Appl., pp. 222-225).

(31) According to the U.S. Census, the 1970 population of League City was 10,818 (H. on Appl., pp. 226-227).

(32) He (Dr. Brosky) updated that 1970 population of League City and, in doing so, he used four (4) different ways of estimating it, to-wit, the electrical connections, school enrollment data, League City tax rolls and building permits (H. on Appl., pp. 227-238).

(33) He (Dr. Brosky) estimated the 1974 population of League City to be 12,981, the 1975 population to be 13,414 and the 1976 population to be 13,847 (H. on Appl., pp. 238-240).

(34) In his opinion, using a four per cent (4%) annual increase from and after 1969, the average family income in League City for the year 1974 will be

$14,928; for the year 1975, $15,425; and for 1976, $15,923 (H. on Appl., pp. 240-242).

(35) Using an average of 3.2 persons per household the number of families in League City in the year 1974 will be 4,057; in the year 1975, 4,192 families; and in the year 1976, 4,327 families (H. on Appl., pp. 242-243).

(36) The total family personal income in League City in 1974 will be $60,563,000; that it will be $64,662,000 in 1975; that it will be $68,899,000 in 1976; and that these sums would constitute the base upon which savings are going to be made and are drawn (H. on Appl., pp. 243-244).

(37) He (Dr. Brosky) calculated the savings potential in League City using figures published in the Savings and the Loan Fact Book for 1972 to arrive at what per cent of family personal income one would expect to be converted into savings; and, this percentage he concluded to be six per cent (6%) (H. on Appl., pp. 245-250).

(38) The savings potential in League City for 1974 will be $3,634,000; for 1975 $3,880,000; and for 1976 $4,134,000 (H. on Appl., pp. 245-250).

(39) The average cost of homes in League City is in excess of $20,000; that construction costs for new building permits in League City for 1972 was $4,580,000; and that such sum was available for mortgage loan business. Applicant's Exhibit No. 22 (H. on App., pp. 250-253).

(40) In his opinion, there is a public need for an additional savings and loan office in League City and the volume of business in League City is such that the proposed savings and loan association would be a profitable operation within a very short period of time (H. on Appl., pp. 255-256).

The underlying facts supporting finding of fact number 10, above, are as follows:

a. The data furnished with the application, to-wit, the instrument entitled "City Savings Association—League City, Texas—Projected Income and Expense" shows that the proposed association expects to have a net loss of $6,770 in its first year of operation; net income of $36,300 in its second year of operation; and net income of $91,900 in its third year of operation.

b. The stipulation of all parties that the witness, Dr. William A. Blachman, possesses the necessary educational, business and professional experience that would qualify him to testify as an expert witness in the hearing on this application in the field of economics and marketing (H. on Appl., pp. 126-127).

c. The testimony of the witness, Dr. William A. Blackman, that:

(1) The primary trade area which the proposed association would serve is that which has been delineated in red on a map of the Houston-Galveston area; that the location of the proposed association is that which has been delineated by a dot in approximately the middle of such map; and that the primary trade area so delineated on such map is a close approximation of the city limits of League City. Applicant's Exhibit No. 2 (H. on Appl., pp. 131-133).

(2) The larger or general area which the proposed association would serve is that which has been delineated

in blue on a map of the Clear Lake area; and such delineation in blue on that map represents the boundaries of the Clear Creek Independent School District. Applicant's Exhibit No. 3 (H. on Appl., pp. 130; 133-135; 148).

(3) The Clear Creek Independent School District includes the incorporated communities of Clear Lake Shores; El Lago, Kemah, League City, Nassau Bay, Seabrook, Taylor Lake and Webster; the residential area known as Clear Lake City; the industrial developments at Bayport; and the Manned Spacecraft Center. Applicant's Exhibit No. 3 (H. on Appl., pp. 133-135).

(4) The locations of the five (5) existing savings and loan association facilities in the Clear Creek area have been delineated on a map of the area with blue dots; and the site of the proposed savings and loan association has been delineated thereon with an unnumbered dot. Applicant's Exhibit No. 4 (H. on Appl., pp. 144-150).

(5) There is only one existing savings and loan association facility in the primary trade area of the proposed savings and loan association; and that one existing facility is a branch office of Security Savings and Loan Association (H. on Appl., p. 145).

d. The testimony of the witness, Dr. John J. Brosky, that:

(1) He is Professor of Finance at the University of Houston (H. on Appl., p. 193).

(2) He is and has been a consultant for several Houston banks; for National Association of Credit Management; for Credit Research Foundation; for Graduate

School of Credit and Financial Management at Dartmouth and Stanford; for Washington State Consumer Finance Association; for National Consumer Finance Association; for Arizona State Consumer Finance Association; and for Oregon Consumer Finance Association (H. on Appl., p. 194).

(3) He has performed about ten (10) economic feasibility studies in connection with applications for savings and loan associations and banks (H. on Appl., pp. 194-195).

(4) He received his Ph.D. degree in Finance, Economics and Statistics from the University of Texas in 1961 (H. on Appl., p. 193).

(5) Sixty-six per cent (66%) of the families in the primary trade area were making $10,000 or more annually in 1970. Applicant's Exhibit No. 14 (H. on Appl., pp. 206-209).

(6) From 1967 to 1972, Cullen Savings Association (just outside of primary trade area) had a 153% increase in mortgage loans, a 186% increase in assets, a 163% increase in savings; and its rate of growth is about nine (9) times the national rate of growth. Applicant's Exhibit No. 21 (H. on Appl., pp. 222-225).

(7) From 1967 to 1971, Security Savings and Loan Association (with a branch office within the primary trade area) had an increase of thirty-nine per cent (39%) in mortgage loans, a forty-nine per cent (49%) increase in savings, and a forty-two per cent (42%) increase in assets. Applicant's Exhibit No. 21 (H. on Appl., pp. 222-225).

(8) From 1971 to 1972, Security Savings and Loan Association had a twenty per cent (20%) increase in mortgage loans, a thirty-one per cent (31%) increase in savings and a nineteen per cent (19%) increase in assets. Applicant's Exhibit No. 21 (H. on Appl., pp. 222-225).

(9) The total family personal income in League City in 1974 would be $60,563,000; that it will be $64,662,-000 in 1975; that it will be $68,899,000 in 1976; and that these sums would constitute the base upon which savings are going to be made and are drawn (H. on Appl., pp. 243-244).

(10) The savings potential in League City in 1974 would be $3,634,000; that it will be $3,880,000 in 1975; that it will be $4,134,000 in 1976; and that these figures only include personal savings and do not include potential savings deposits from corporations, partnerships or governmental agencies (H. on Appl., pp. 245-250).

(11) The average cost of homes in League City is $20,000; that the amount of construction costs for new building permits in League City for 1972 was $4,580,000; and that such sum was available for mortgage loan business. Applicant's Exhibit No. 22 (H. on Appl., pp. 250-253).

(12) In his opinion, the chartering of another savings and loan association in League City will not unduly harm any existing savings and loan association (H. on Appl. 256-257).

ACCORDINGLY, the Savings and Loan Commissioner of Texas concluded that he should approve the application of Jack Apple, Johnnie Arolfo, Jr., Rex Bailey, Robert W. Hervey, James A. Lammers, Jack Rowe and

Raymond Schindler for a charter for a savings and loan association to be named City Savings Association and whose principal office is to be located at 110 State Highway 3, League City, Galveston County, Texas; and

It is, therefore, ORDERED by the Savings and Loan Commissioner of Texas that the application of Jack Apple, Johnnie Arolfo, Jr., Rex Bailey, Robert W. Hervey, James A. Lammers, Jack Rowe and Raymond Schindler for a charter for a savings and loan association to be named City Savings Association and whose principal office is to be located at 110 State Highway 3, League City, Galveston County, Texas, shall be, and it is hereby, in all things APPROVED.

This amended order is in lieu of the original order which was made and entered on the 24th day of April, 1973, in connection with such application and is made and entered pursuant to the opinion and judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin in its Cause Number 12,205 styled "Security Savings and Loan Association of Dickinson, Texas, Appellant, v. W. Sale Lewis, Savings and Loan Commissioner of Texas, et al., Appellees."

MADE and ENTERED at Austin, Texas, on this the 22nd day of January, 1975.

/s/ W. SALE LEWIS
W. Sale Lewis, Savings and Loan
Commissioner of Texas

EXHIBIT B

NO. 230,557

In The
DISTRICT COURT
Of Travis County, Texas
201st Judicial District

SECURITY SAVINGS AND LOAN ASSOCIATION
OF DICKINSON, TEXAS

v.

HONORABLE W. SALE LEWIS,
SAVINGS AND LOAN COMMISSIONER
OF TEXAS, ET AL

JUDGMENT

BE IT REMEMBERED that, on the 29th day of May, 1975, came on for trial the captioned cause wherein Security Savings and Loan Association of Dickinson, Texas, and Mainland Savings Association are Plaintiffs, Honorable W. Sale Lewis, Savings and Loan Commissioner of Texas, is Defendant and City Savings Association is Intervenor; and came the Plaintiff, Security Savings and Loan Association of Dickinson, Texas, the Defendant and the Intervenor and announced ready for trial, but Plaintiff, Mainland Savings Association did not appear, made no announcement and did not participate in the trial of this cause.

Whereupon, the Court proceeded to hear and consider the evidence proferred, arguments of counsel for said

parties and the briefs filed by said parties; and, after due and careful consideration of such evidence, arguments and briefs, the Court found and concluded that Defendant's "Amended Order" dated January 22, 1975, is valid as to form and complies with each and all of the requirements of Article 852a, V.A.C.S., and that each and all of the affirmative findings made by Defendant in said "Amended Order" pursuant to Article 852a, Section 2.08, V.A.C.S., are reasonably supported by substantial evidence.

Accordingly, it is, therefore, ORDERED, ADJUDGED and DECREED by the Court that Defendant's "Amended Order" dated January 22, 1975, granting a charter to said Intervenor for a savings and loan association to be located at 110 State Highway 3, League City, Galveston County, Texas, shall be, and it is hereby, SUSTAINED, AFFIRMED and UPHELD.

It is, consequently, further ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs shall have and take nothing herein by reason of such suit.

It is further ORDERED, ADJUDGED and DECREED by the Court that all costs of Court shall be, and the same are hereby, TAXED against Plaintiff, Security Savings and Loan Association of Dickinson, Texas.

It is further ORDERED, ADJUDGED and DECREED by the Court that any and all other relief which has been sought or prayed for by any of the said parties hereto which has not been specifically granted by the terms hereof shall be, and the same are hereby, in all things DENIED.

And, to which findings and judgment of the Court Plaintiff, Security Savings and Loan Association of Dickinson, Texas, duly and timely excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

SIGNED, at Austin, Travis County, Texas, on this 23rd day of March 1976.

/s/ JERRY DELLANA
Judge Presiding

APPROVED AS TO FORM ONLY:

CLARK, THOMAS, WINTERS & SHAPIRO

By: /s/ MARY JOE CARROLL

Attorneys for Plaintiff, Security Savings and Loan Association of Dickinson, Texas

/s/ RAYMOND M. HILL
Raymond M. Hill

Attorney for Plaintiff,
Mainland Savings Association

JOHN L. HILL
Attorney General of Texas

By: /s/ PATRICK T. ROGERS
Assistant Attorney General

Attorneys for Defendant

BAKER & HEARD

By: /s/ LOWELL B. HAYES

KENNERLY & PRICE
Charles L. Price

Attorneys for Intervenor

EXHIBIT C

IN THE
COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 12,483

SECURITY SAVINGS AND LOAN ASSOCIATION
OF DICKINSON, TEXAS,
Appellant

v.

W. SALE LEWIS, SAVINGS AND LOAN
COMMISSIONER OF TEXAS, ET AL.,
Appellees

FROM THE DISTRICT COURT OF TRAVIS
COUNTY, 201ST JUDICIAL DISTRICT
NO. 230,557, HONORABLE JERRY A. DELLANA,
JUDGE

Security Savings and Loan Association of Dickinson, has appealed from the judgment of the district court of Travis County sustaining the order of the Savings and Loan Commissioner of Texas granting a charter for City Savings Association to be located in League City. Appellant is Security Savings and Loan Association, and appellees are the proposed association, City Savings As-

sociation, and W. Sale Lewis, Savings and Loan Commissioner of Texas.

This is the second appearance of this case in this Court. In the previous appeal, this Court reversed the judgment of the district court and remanded the cause to the Commissioner for the reason that the statement of underlying facts in the Commissioner's order was not in compliance with Tex. Rev. Civ. Stat. Ann. art. 852a, § 11.11(4) (1964). 515 S.W.2d 392 (Tex. Civ. App. 1974, no writ).

After remand, and without receiving additional evidence the Commissioner entered an "amended" order on January 22, 1975. The amended order, as did the original order, approved the creation of City Savings Association. Appellant appealed from the Commissioner's order to the district court of Travis County.

At trial the "hearing record and all exhibits" certified to by the Commissioner were received in evidence. In addition to the record certified by the Commissioner, City Savings Association offered in district court the following documents for admission into evidence:

(1) Instrument entitled "Application for Charter for a Savings and Loan Association" including certain attachments or exhibits thereto, to-wit:

(a) Letter from Capital National Bank to the Savings and Loan Commissioner dated October 27, 1972;

(b) List of stockholders;

(c) Instrument entitled "Statement of Proposed Managing Officer";

(d) Instrument entitled "City Savings Association League City, Texas Projected Income and Expense";

(e) Proposed loan instruments (note and deed of trust); and

(f) A brief summary of matters relevant to Section 2.08(2), (3) and (4) of the Texas Savings and Loan Act.

(2) Instrument entitled "Articles of Incorporation."

(3) Instrument entitled "By-Laws of City Savings Association League City, Texas."

Document (1)(f) is attached to the application and is, in part, a summary of the background and experience of the directors of the proposed association. As might be expected, that summary presents an optimistic account of those persons.

Also contained in document (1)(f) is a statement of the evidence supporting the contention that there is a public need for the proposed association, the contention that the volume of business in the community is such as to indicate a profitable operation, and the contention that the proposed association will not unduly harm any existing association. That statement is set out below:

> "(2) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation.
>
> "Today League City is growing at a rate of about 20% per year. There is only a branch office in League City. There is no way that this branch office can process loans without clearance from the home office. This branch office is in the same building with a bank. As you can see by the number of people that subscribe to shares in the proposed as-

sociation, they also feel the need. We could at this time open with over one million and a half dollars in deposits. We find from the public that there is available within the next two years some five million in addition. We feel that this association will be ranked in the top ten associations in Harris and Galveston Counties within ten years. The Galveston County Council has predicted that this area, by the turn of the century alone, will have almost 700,000 people.

"Competition is needed badly now, as many builders have told us that they could not get competitive loans without coming to Houston. Competition is vitally needed for the public good. This business will be operated as a profitable operation in the first year, as shown by our budget figures. The public need is there. As one employee from another association told us, she has sent over seven and a half million dollars in loans to Houston this year alone. The money is there for the association, if competition can be created. The savings and loan institution, as such, has not been sold to this community, because of the ownership of the branch office and the bank being in one man's hands.

"(3) the operation of the proposed association will not unduly harm any existing association.

"The operation of this association will not unduly harm the existing association branch because it is neither pushing for loans nor deposits. Many people in League City did not even know that that association exists and many people want to put their money where they can get the most interest. It will only add a new dimension for the many people that now have money on demand deposits rather than savings. There is no way that this association could harm the existing association. It could only help."

It is undisputed that the above instruments were not introduced into evidence at the agency hearing and did not form a part of the record certified by the Commissioner.

Appellant objected to the offer in district court upon the basis that the instruments were not introduced into evidence at the Commissioner's hearing and were not a part of the record certified by the Commissioner. Appellant objected further that the hearing officer had not officially noticed the contents of the instruments in the hearing and that the instruments were hearsay.

It was important for appellees to have the district court admit the instruments into evidence because same statements in those instruments were utilized in the Commissioner's order as "underlying facts" in support of his order. The district court admitted the instruments into evidence for all purposes. In response to counsel's inquiry in this regard, the court replied that the instruments were admitted for ". . . *the facts stated therein.*" (Emphasis added)

The admission of the instruments in evidence forms the basis for appellant's initial point of error.

Judicial review of orders of the Savings and Loan Commissioner is controlled by Tex. Rev. Civ. Stat. Ann. art. 852a, § 11.12 (1964). Section 11.12(5)(b) provides in part that ". . . no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing."

The evidence subject to judicial review is that certified by the Commissioner pursuant to § 11.12(4). Section

11.12(4) requires that after service of the petition upon the Commissioner, he shall ". . . certify to the District Court in which such petition is filed the record of the proceedings to which the petition refers."

The above quoted provisions were construed by the Supreme Court in Gerst v. Nixon, 411 S.W.2d 350, 357 (Tex. 1966). In that case Justice Norvell wrote:

> "* * * The requirement that the Commissioner file a record of the proceedings had before him with the District Court clearly implies that such record is to be considered by the court. While the last phrase contained in Section 11.12, subsection (5) (b), could have been more artfully worded, it seems reasonably clear that when considered in connection with other portions of the Act, the purpose of the words, 'no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing,' was to adopt the rule that the Commissioner's order is to stand or fall upon the evidence adduced and matters noticed at the Commissioner's hearing. It is from this record that the District Judge is to determine whether or not the Commissioner's order is arbitrary, i.e., whether it is reasonably supported by substantial evidence."

Since Gerst v. Nixon, *supra,* the uniform view has been that judicial review in cases involving applications for savings and loan charters has been limited to the Commissioner's certified record. Lewis v. Southmore Savings Association, 480 S.W.2d 180 (Tex. 1972), Lewis v. Guaranty Federal Savings and Loan Association, 483 S.W.2d 837 (Tex. Civ. App. 1972, writ ref'd n.r.e.).

Appellees contend that the district court correctly admitted the instruments in evidence because the instruments were ". . . officially noticed in the record of such hearing" in compliance with § 11.12(5)(b). In support of their position, appellees rely upon Citizens of Texas Savings and Loan Association v. Lewis, 483 S.W.2d 359 (Tex. Civ. App. 1972, writ ref'd n.r.e.). We will refer to *Citizens* later in this opinion.

In adopting appellees' contention, the district court necessarily relied upon certain statements of the hearing officer concerning "notice," the most formal of which was:

> "Now, this concludes our introductory remarks, except to say that the Commissioner will take official and judicial knowledge of the fact that the application contains all of the prerequisites and that the protests are duly and timely filed, in connection with this particular hearing."

We have concluded that the district court erred in admitting the instruments. The reasons for our conclusions follow. It is basic that a charter application hearing before the Savings and Loan Commissioner is an adversary proceeding. The application for a savings and loan association charter along with the accompanying documents constitutes the administrative pleadings of the charter applicant. Lewis v. Guaranty Federal Savings and Loan Association, *supra.* In a contested hearing the applicant has the burden of going forward and of proving by competent evidence its case for a charter. In such a hearing the application and supporting documents, without other proof, would not suffice to support an order granting the charter. Stated another way, the

applicant in a contested hearing could not close without placing competent evidence in the record in support of every element necessary to obtain the charter. If the charter applicant needs to rely upon the application and the supporting documents for proof of facts, it is incumbent upon the applicant to tender those instruments into evidence at the agency hearing. As in an ordinary trial opposing counsel then would have an opportunity to object to the admission of those documents. By failing to offer the documents, the applicant waives the right to have the instruments considered, because until their introduction into evidence, the protestants have had no opportunity to cross-examine with regard to the materials contained in the documents.

In a contested hearing we doubt that the Commissioner could relieve the charter applicant of the burden of establishing its case by competent evidence by officially noticing the *contents* of the application and the accompanying documents. If that proposition were true, after the application and documents had been filed and noticed, the applicant could rest and the protestants then would have the burden of disproving the self-serving statements usually found in the instruments submitted with an application.

That issue is not in this appeal because the statement of the hearing officer did no more than notice that the application was in order and that the application and the supporting documents had been "duly and timely" filed. It is true that the Commissioner may officially notice in the record the filing of the application and attached documents. Citizens of Texas Savings and Loan Association v. Lewis, *supra*. Appellee, however, did not

offer the materials in evidence in district court as *proof of filing*, but instead it offered, and the court admitted, the material as *proof of the statement of facts* contained therein. Notice by the hearing officer of the filing of the instruments is *not* proof of the statements contained therein. The district court erred in permitting the charter applicant to supply proof in district court to plug holes in the agency record.

Citizens of Texas Savings and Loan Association v. Lewis, *supra*, is not authority for the district court's admission of the application and supporting instruments for the truth of the material contained therein. No application and supporting instruments were received as additional evidence by the district court in that case. The appellants in *Citizens* were complaining only of the fact that the Commissioner took official notice of the filing of the charter application. This the Commissioner had the right to do.

An examination of the "underlying facts" in the Commissioner's amended order demonstrates that the district court's error in admitting the application and supporting documents was not an academic one. Statements from the application and the supporting documents were utilized in that order as "underlying facts" in support of the Commissioner's findings that the proposed association had complied with the requirements of § 2.02 § 2.03, § 2.04, § 2.05, and § 2.06 of the Savings and Loan Act. Those particular "underlying facts" are not to be found in the Commissioner's record. The error complained of amounted to such a denial of appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

The judgment is reversed and the cause is remanded to the Savings and Loan Commissioner of Texas for further proceedings consistent with this opinion.

Bob Shannon, Associate Justice

Reversed and Remanded

Filed: February 16, 1977

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

NO. B-6699

CITY SAVINGS ASSOCIATION, ET AL.,
Petitioners

v.

SECURITY SAVINGS AND LOAN ASSOCIATION OF DICKINSON, TEXAS,
Respondent

FROM TRAVIS COUNTY THIRD DISTRICT

This is a suit by Security Savings and Loan Association of Dickinson, Texas, to set aside an order of the Savings and Loan Commissioner granting the charter application of City Savings Association to be located in League City. Texas. The district court upheld the Commissioner's order, but its judgment was reversed and the cause remanded to the Commissioner for further proceedings by the court of civil appeals. 547 S.W.2d 710. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

Upon the trial, petitioner, introduced the record of the hearing held by the Commissioner, and a certified copy of the petitioner's application for charter. The trial court admitted the charter application with its attached exhibits. The court of civil appeals held this to be reversible error because the application was not offered in evidence before the Commissioner, but it did not pass on

the contention that the Commissioner's order was not supported by substantial evidence.

Judicial review of orders of the Savings and Loan Commissioner is controlled by Art. 852a § 11.12.[1] Section 11.12(5) (b) provides in pertinent part:

> The review of any other act, order, ruling or decision of the Commissioner or of any rule or regulation shall be tried by the court without a jury in the same manner as civil actions generally . . . but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing.

The Savings and Loan Act is rather specific in its requirements concerning the application for savings and loan charters and the Commissioner's consideration of such applications. Section 2.07 provides that when a "proper" application for a charter has been filed, the Commissioner is required to set a hearing and give interested parties an opportunity to appear and present evidence for or against such application. Section 2.01 sets out the requirements for an application for a charter. It must be shown that the capitalization requirements of Section 2.02 through 2.04 have been met and the required funds paid in. The application must also contain two copies of Articles of incorporation for the proposed association stating (1) the name of the association; (2) the site of the principal office; and (3) the names and addresses of the intended directors. Two copies of the bylaws under which the association proposes to operate

1. Statutory references are to Tex. Rev. Civ. Stat. Ann. (Vernon's 1964).

are to be included, together with statements, exhibits, maps and other data sufficiently detailed and comprehensive to enable the Commissioner to pass on the matters set forth in Section 2.08(2), (3), and (4) of the Act. The requirements of this section of the Savings and Loan Act are very similar to Rule 1.1 of Rules and Regulations for Savings and Loan Associations. Section 2.08 of the Act provides "that the Commissioner shall not approve any charter application unless he shall have affirmatively found from the *data furnished with the application,* the evidence adduced at such hearing, and his official records that:"

> (1) the prerequisites, where applicable set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 have been complied with and that the Articles of incorporation comply with all other provisions of this Act;
>
> (2) the character, responsibility and general fitness of the persons named in the Articles of incorporation are such as to comand confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act and that the proposed association will have qualified full-time management;
>
> (3) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation;
>
> (4) the operation of the proposed association will not unduly harm any existing association. [Emphasis added.]

Since Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966), it has been settled that judicial review in cases involving applications for savings and loan charters is limited to the Commissioner's certified record. There the court held that the Legislature had adopted "the rule that the Commissioner's order is to stand or fall upon the evidence adduced and matters noticed at the Commissioner's hearing. It is from this record that the District Judge is to determine whether or not the Commissioner's order is arbitrary, i.e., whether it is reasonably supported by substantial evidence. The circumstance that the record of the Commissioner's hearing contains hearsay or other species of evidence deemed unreliable is a matter for the consideration of the trial judge in determining the issue of 'substantial evidence.' " Through the process of official notice, the application, including the documents attached to the application as a part of it, becomes a part of the record in the matter. Citizens of Texas Savings and Loan Association v. Lewis, 483 S.W.2d 359 (Tex. Civ. App. 1972, writ ref'd n.r.e.).

It is petitioner's contention that the Commissioner properly complied with the requirements of Section 2.08 in approving the application for a charter by considering the "data furnished with the application," the evidence adduced at such hearing, and his official records. At the beginning of the administrative hearing, the hearing officer placed in the record the following statement:

> Now, this concludes our introductory remarks, except to say that the Commissioner will take official and judicial knowledge of the fact that the application contains all of the prerequisites and that the protests are duly and timely filed, in connection with this particular hearing.

We think the Commissioner "officially noticed" the application when he officially found that it contained all prerequisites under Sections 2.01, 2.01a, 2.02, 2.03, 2.04 and 2.08. Thus the capitalization requirements of a proposed savings and loan charter, i.e., a statement as to the amount, if any, of permanent reserve fund subscribed and paid; the names and addresses of such subscribers and the amount subscribed; the amount of savings liability, if any, with, which the association will commence business; and the amount of paid in surplus or expense fund with which the association will commence business as required by Sections 2.01, 2.02, 2.03, and 2.04, were officially noticed by the Commissioner and were before him. The capitalization, subscribers, and amount subscribed are definite and specific. These requirements are not speculative or subject to interpretation. The application was made known to respondents by official notice of the hearing and the respondents had an opportunity to examine, test and challenge this material.

The requirements of Sections 2.08(2), (3), and (4), namely, the character, responsibility and general fitness of the proposed incorporators, public need and profitability, and absence of undue harm of any existing associations were also "officially noticed" by the Commissioner and became a part of the record before the Commissioner.

Having been "officially noticed" by the Commissioner and thus a part of the record before him, the application, together with its attached exhibits, was admissible in the trial court, not as conclusive proof of the statements contained therein, but as evidence subject to be reviewed

by the trial court. We think the court of civil appeals improperly found this evidence inadmissible in the trial court and not a part of the record. However, even if it may be said the application was erroneously admitted into evidence in the trial court, it was not essential to support the Commissioner's order.

Although respondents principally rely on the contention that reversible error was committed by the trial court in admitting into evidence petitioners' application for charter, they also have counterpoints of error which contend that the holding of the court of civil appeals is correct because there was not substantial evidence to support the Commissioner's order granting the charter.

In considering this contention we will be governed by the well settled substantial evidence rule. Lewis v. Gonzales County Savings and Loan Association, 474 S.W.2d 453 (Tex. 1971); Gerst v. Goldsbury, 434 S.W.2d 665 (Tex. 1968); Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1967).

The following information was contained in the application for charter and the attached exhibits, and was used by the hearing officer in finding the underlying facts supporting his order; permanent reserve stock would be issued; the stock would not be retired or withdrawn except as prescribed by law; 25,000 shares were to be issued, with a par value of $10.00; $250,000 had been paid-in; there was a paid-in surplus of $62,500; the name of the association, its site, and the names and addresses of its directors; and the expectation of the applicants would be a net loss of $6,770 in the first year of operation, a net income of $36,300 in the second year, and a net income of $91,900 in the third year. This information was also

included in the direct testimony by witnesses and exhibits offered by the applicants for the charter, thus the documents were cumulative of the direct evidence offered before the Commissioner. Two economists, a building contractor and a director and manager of the proposed Savings and Loan Association testified. The two economists testified that the primary trade area for the proposed Savings and Loan Association, League City, Texas, had the following characteristics: a 4% growth rate; a mean family income of $12,483; 1.1% unemployment; 6% of its population were below the poverty level; 40% of the population was under thirty-five years of age; the average cost of homes was in excess of $20,000. They further testified that there was only one savings and loan association and one bank in the primary trade area. Approximately 4.5 million dollars worth of construction took place in 1970 in the area. Other banks and savings and loan associations in the area surrounding the primary trade area had an increase in assets ranging from 42% to 186%. They noted that there was a substantial increase in time and savings deposits in the general area. They testified that the savings potential in 1974 was $3,634,-000. In 1975 it would be $3,800,000, and in 1976 it would be $4,734,000. Both economists concluded that League City needed another savings and loan association, and that no undue harm would result from a second savings and loan association. Mr. Lammers, a Director and Manager of the proposed Savings and Loan Association testified as to the character of the directors, outlining their past business experience, in addition to the financial structure of the proposed Savings and Loan Association.

Respondents offered rather extensive evidence in opposition to the application including the testimony of an

economist whose testimony contradicted in some aspects the testimony offered by the petitioner.

While there is evidence to the contrary, we believe there is substantial evidence in the record to support the Commissioner's order granting the charter application of Petitioner, City Savings Association, to be located in League City, Texas.

The judgment of the court of civil appeals is reversed and the judgment of the trial court is affirmed.

James G. Denton
Justice

Dissenting opinion by Justice Steakley in which Justice Pope joins.

Opinion delivered January 18, 1978.

EXHIBIT E

IN THE
SUPREME COURT OF TEXAS

NO. B-6699

CITY SAVINGS ASSOCIATION, ET AL,
Petitioners,

v.

SECURITY SAVINGS AND LOAN ASSOCIATION
OF DICKINSON, TEXAS,
Respondent.

FROM TRAVIS COUNTY

THIRD DISTRICT

DISSENTING OPINION

I agree with the writing and the judgment of the Court of Civil Appeals and in respectfully dissenting would add only this.

We had best confine judicial review to the record certified by the Commissioner and from this determine if the applicant has discharged its factual burden under Sections 2.01-2.08 of Art. 852a. See *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1966), where we wrote:

> The substantial procedural change in this rule by the 1963 Act was to make the record of the Commissioner's hearing *rather than evidence produced originally in court* the basis from which it must be determined if the evidence conclusively required

> affirmative findings relating to the matters mentioned in subsections (3) and (4) of Section 2.08. (Italics added for emphasis).

Perhaps it is not amiss to consider the application and attached documents noticed by the Commissioner but not offered in evidence at the administrative hearing, to determine if the jurisdiction of the Commissioner was invoked. This was clearly the purpose of the "notice" of these documents by the hearing officer here: ". . . the Commissioner will take official and judicial knowledge of the fact that the application contains all the prerequisites. . . ."

But the court has gone much farther than this. Approved is the action of the trial court in expanding the certified record to include the application and all of the attached exhibits "for the facts stated therein." This is justified on the theory that "through the process of official notice" all is a part of the record whether or not introduced in evidence at the administrative hearing, and whether or not included in the certified record. *Citizens of Texas Savings and Loan Association v. Lewis,* 483 S.W.2d 359 (Tex. Civ. App. 1972, writ ref'd n.r.e.), is cited in support. But this decision merely holds that the Commissioner may "notice" the application and his official records for the purpose of determining if his jurisdiction to decide the issues of public need, profitable operation and undue harm to existing associations, has been properly invoked.

Not only this but the court has also sanctioned the use by the hearing officer of the information contained in the application and attached exhibits "in reporting the

underlying facts supporting his order," notwithstanding these documents were not offered in evidence by the applicant.

As I see it, this raises serious questions of due process by reason of the absence of opportunity for cross-examination. Moreover, the administrative process is confused as to the initial burden on the applicant, and one is left to wonder at what point and under what showing are facts to be considered as established and subject to refutation.

Zollie Steakley
Justice

Justice Pope joins in this Dissent.

OPINION DELIVERED: January 18, 1978

Supreme Court, U. S.
FILED
JUN 13 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1634

SECURITY SAVINGS AND LOAN ASOCIATION OF DICKINSON, TEXAS,
Petitioner

v.

CITY SAVINGS ASSOCIATION,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1634

SECURITY SAVINGS AND LOAN ASOCIATION OF DICKINSON, TEXAS,
Petitioner

v.

CITY SAVINGS ASSOCIATION,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This cause should not be reviewed by this Court and the "Petition For Writ Of Certiorari To The Supreme Court Of The State of Texas" should be dismissed or denied because of each and all of the matters and grounds disclosed herein.

OPINIONS DELIVERED IN COURTS BELOW

The Supreme Court of Texas did not find or conclude that the Hearing Officer merely officially noticed the filing of Respondent's application for a savings and loan charter. The Supreme Court of Texas, as the District

Court had done, interpreted the opening statement made by the Hearing Officer and concluded that the Savings and Loan Commissioner officially noticed Respondent's application when the Hearing Officer officially found that the application contained all of the prerequisites under the Texas Savings and Loan Act. Having reached that conclusion, the Court declared that, thus, the facts and data furnished with the application were officially noticed by the Commissioner and were before him and became a part of the record before the Savings and Loan Commissioner.

The opinion of the Supreme Court of Texas is reported at 560 S.W. 2d 930.

JURISDICTION

This Court is without jurisdiction of this cause for the reason that no federal question is before this Court in this cause and none exists, the questions presented being purely state or local questions.

This Court is without jurisdiction of this cause for the reason that no federal question was presented by Petitioner to the Supreme Court of Texas for decision and no federal question was actually decided by the Supreme Court of Texas.

This Court is without jurisdiction of this cause for the reason that the only possible federal question presented, to-wit, Petitioner's claim of denial of due process of law by the Savings and Loan Commissioner of Texas, was neither timely nor properly raised, below, and has been raised or presented for the first time in this Court.

This Court is without jurisdiction of this cause for the reason that the decision of the Supreme Court of Texas rests on still other independent and adequate state (non-federal) grounds.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Texas Savings and Loan Act, Article 852a, Revised Civil Statutes of the State of Texas [Vernon's Texas Civil Statutes]:

Sec. 2.01. [Appendix p. 27]
Sec. 2.02. [Appendix p. 28]
Sec. 2.03. [Appendix p. 29]
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Sec. 2.07. [Appendix p. 30]
Sec. 2.08. [Appendix p. 30]
* * * *
Sec. 11.11. [Appendix p. 31]
Sec. 11.12. [Appendix p. 32]

Texas Rules of Civil Procedure, Rule 503. [Appendix p. 33]

28 U.S.C. § 2111. [Appendix p. 33]

Federal Rules of Civil Procedure, Rule 61. [Appendix p. 33]

QUESTIONS PRESENTED FOR REVIEW

Petitioner's claim that it was denied due process of law, upon judicial review in the District Court, by the admission in evidence of Respondent's application for a savings and loan charter, is a mere fiction.

There were neither pleadings nor proof by Petitioner, upon judicial review, that a motion for rehearing, based upon denial of due process by the Commissioner as a result of his consideration of Respondent's application, had been filed by Petitioner after the order complained of had been entered by the Commissioner and that such motion had been overruled by the Commissioner. And, of course, no motion for rehearing was filed by Petitioner.

There were neither pleadings nor proof by Petitioner, upon judicial review, that the Commissioner did not promptly notify Petitioner of the entry of the order. And, of course, the Commissioner did promptly notify counsel for Petitioner of the entry of the order.

Petitioner's pleadings, upon judicial review, contained no allegation that the order of the Savings and Loan Commissioner was invalid for the reason that the Commissioner's reliance on data furnished with Respondent's application deprived Petitioner of due process of law. Petitioner merely alleged that such data was not officially noticed in the record of the hearing and was not offered in evidence and, hence, that the order was invalid because there was no record support for the Commissioner's findings of ultimate facts (Tr. 75).

Consequently, the only matter which the District Court had before it, when Respondent's application was offered in evidence upon judicial review, was the matter of interpreting the statement which had been made by the Hearing Officer. And, the District Court's interpretation of that statement was the same as that of the Supreme Court of Texas. That determination having been made by the District Court, such evidence was obviously admissible. Article 852a, Sec. 11.12(5) (b), Revised Civil

Statutes of the State of Texas. Stated otherwise, under those circumstances, when Petitioner's objection to the admissibility of the application, upon the grounds that it had not been officially noticed in the record of the hearing, was overruled by the District Court, Petitioner's other objections to the admissibility of the application became inappropriate and moot. Indeed, it would have been either fundamental error or reversible error if the District Court had, then, considered and sustained one of Petitioner's other objections.

The remaining questions presented by Petitioner are actually the presentation of only one question, to-wit, did the Savings and Loan Commissioner's consideration of Respondent's application and reliance on parts of that application deprive Petitioner of due process of law.

The discussion of this question, above, under the heading "Jurisdiction" will not be repeated, here.

There is nothing inherently unconstitutional about the "official notice" doctrine in administrative law. Such arises only from abuse of the doctrine, as in the cases cited and discussed by Petitioner. As will be demonstrated herein, below, the abuse of that doctrine which was present in *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 68 L.Ed. 1016 (1924), and in *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 81 L.Ed. 1093 (1937), is non-existent, here. Petitioner had adequate and sufficient notice of the specific data with which it would be confronted at the administrative hearing. Section 2.08 of the Texas Savings and Loan Act. Petitioner had adequate and sufficient notice that such data would be admissible upon judicial review if officially noticed in the record of the hearing. Section

11.12(5)(b) of the Texas Savings and Loan Act. Petitioner even had notice of the type of statement by the Hearing Officer which would constitute such official notice of that data. *Citizens of Texas Savings & Loan Association v. Lewis, Savings and Loan Commissioner,* 483 S.W.2d 359 (Tex. Civ. App. 1972; ref'd. n.r.e.). Also, in those cases cited by Petitioner the objectionable evidence was heavily relied upon by the administrative agencies.

Contrary to Petitioner's representations to this Court, Respondent's application for charter and the contents thereof were subjected to cross-examination by counsel for Petitioner at the administrative hearing, and Respondent's application for charter was duly verified or sworn to by each and all of Respondent's incorporators.

There was no "failure to follow administrative rules", here, nor "the institution of a new procedure which had the effect of changing the burden of proof." That these generalizations are without any merit has been shown herein under other headings.

STATEMENT OF THE CASE

Petitioner has at least suggested that, when the original order was made by the Savings and Loan Commissioner of Texas granting Respondent's application for a savings and loan charter, the Commissioner did not consider the data furnished with Respondent's application. One only has to examine the Texas Court of Civil Appeals opinion pertaining to judicial review of that original order, quoted in a footnote on page 7 of the Petition for Writ of Certiorari, to conclude that such data furnished with the application was considered and relied

upon, at that time, by the Savings and Loan Commissioner.

Petitioner states that, after the matter was remanded to the Savings and Loan Commissioner pursuant to the aforementioned decision of the Court of Civil Appeals, the Savings and Loan Commissioner entered the amended order without notice, hearing or reopening the record, and that such amended order was based upon the application for charter and data submitted with the application, instruments which were not verified, never offered in evidence, and not subjected to cross-examination.

Petitioner fails to mention that the matter was remanded to the Commissioner for the limited purpose of revising the order as to its form, with no direction or authorization to reopen the hearing.

Petitioner fails to mention, also, that it did not file a motion for rehearing before the Commissioner, when the amended order was entered, alleging as grounds therefor that Petitioner had been deprived of due process of law by the Commissioner as a result of his consideration of and reliance on part of Respondent's application. Such motion for rehearing could have been filed by Petitioner under Section 11.11(5) of the Texas Savings and Loan Act.

Petitioner's statement that Respondent's application for charter and the data furnished with the application were not verified is not correct. Respondent's application for charter was verified, as required by Section 2.01 of the Texas Savings and Loan Act, as evidenced by Intervenor's Exhibits Nos. 1, 2 and 3 (certified copies of the

instruments) and by the finding thereon made by the Savings and Loan Commissioner in the "Amended Order" [Exhibit A, page 25 of Petition for Writ of Certiorari]. A true copy of Respondent's application for charter is a part of the Transcript (Tr. 43).

Petitioner has represented to this Court that the parties to the administrative hearing, including Petitioner, did not consider the data furnished with Respondent's application for charter as being part of the evidence, upon the administrative hearing, and would have this Court believe that Petitioner had no opportunity, at the administrative hearing, to test the accuracy or truth of such data by cross-examination of Respondent's witnesses. The fact is that Petitioner and other protestants not only had the opportunity to do so, upon the administrative hearing, but actually availed themselves of that opportunity.

All of the parties to the administrative hearing recognized that this data furnished with Respondent's application was as much a part of the evidence as was the testimony and exhibits adduced upon the hearing. That this is so is evidenced by the undisputed fact that the 474-page transcript of the proceedings before the Savings and Loan Commissioner entitled "Hearing on Application" contains numerous references to the application and data furnished with it in the cross-examination of Respondent's witnesses by Petitioner and other protestants. For example, at pages 24-30 of that hearing record, Respondent's witness, Lammers, was cross-examined by counsel for Petitioner about some of the data furnished with the application in an attempt to discredit that data and to use some of it to Petitioner's advantage in arguing,

later, that this would not be a locally owned savings and loan association because the stockholder list which was part of the data furnished with the application showed that many of the stock subscribers reside outside of the community to be served by the proposed savings and loan association. That particular cross-examination of Respondent's witness, Lammers, begins on page 24 ("Hearing on Application") with the following question by counsel for Petitioner:

> "Q. This list that is attached—I have the official file, Mr. Lammers, from the Savings and Loan Department, and the list that is attached here on an application for charter, October 24, received here October 24, 1972. Do you recognize this as the stockholder list that you are referring to?"

And, in that same series of questions by counsel for Petitioner, the following question was asked by counsel for Petitioner at page 26 ("Hearing on Application"):

> "Q. Now, on your budget, Mr. Lammers, and it's in that application which is before you—is it your statement to this Commissioner that from mortgage loans of 1.2 million in your first year of operation, you are going to make $90,000 for the association? income."

The statement made by Petitioner that "upon the basis of those documents [Respondent's application for charter] the trial court held that the Commissioner's order granting the application for charter was 'valid as to form' and 'reasonably supported by substantial evidence'" is mere argument, in addition to being incorrect; and the incorrectness of such statement has been shown herein under other headings.

The Supreme Court of Texas, here, in discussing the Texas law since *Gerst v. Nixon,* ____Tex.____, 411 S.W. 2d 350 (1966), concluded with the statement that "Through the process of official notice, the application, including the documents attached to the application as a part of it, becomes a part of the record in the matter. (Citation)" The Supreme Court of Texas, then, after so stating the applicable law, merely interpreted the statement made by the Hearing Officer and, upon doing so, interpreted that statement as constituting official notice by the Savings and Loan Commissioner of the data furnished with the application such that all of the data was before him and became a part of the record before the Commissioner.

Therein lies the heart of this matter, insofar as the jurisdiction of this Court is concerned. The decision of the Supreme Court of Texas rested on purely local or state (non-federal) grounds. The dissenting opinion of two members of the Supreme Court of Texas, as did the opinion of the Court of Civil Appeals, resulted solely from a disagreement among the Justices as to the interpretation to be given to two state court decisions and to the statement by the Hearing Officer. Those two state court decisions are *Gerst v. Nixon, supra,* and *Citizens of Texas Savings & Loan Association v. Lewis, Savings and Loan Commissioner, supra.* This Court has consistently declined to involve itself in such matters, even if this Court might have reached a conclusion to the contrary.

Contrary to the statement of Petitioner, which is mere argument, such interpretation of the Hearing Officer's statement by the Supreme Court of Texas is not in-

consistent with any other statement made by the Hearing Officer upon the administrative hearing.

Nothing in the decision of the Supreme Court of Texas either changes or in anywise affects existing law on either the matter of burden of proof or the matter of burden of persuasion in hearings before the Savings and Loan Commissioner of Texas. Indeed, that this is so is made quite clear in the opinion of the Supreme Court of Texas.

THE ARGUMENT

The State Court Decision Rests on Local Grounds

It has already been pointed out herein, above, that the decision of the state court rests solely on mere interpretation by the state court of two state court decisions and a statement by the Hearing Officer, matters which are purely state or local (non-federal) questions. This Court has consistently held that it has no power to review such matters and that it has no concern about the correctness or incorrectness of the conclusions reached by the state court in such matters. *United Gas Public Service Company v. State of Texas,* 303 U.S. 123, 82 L.Ed. 702 (1937), reh. den., 303 U.S. 667, 82 L.Ed. 1124 (1938); and *Moffitt v. Kelly,* 218 U.S. 400, 54 L.Ed. 1086 (1910).

The State Court Has Not Decided a Federal Question

Respondent has already pointed out herein, above, that Petitioner's claim of being denied due process of law by the evidence ruling of the trial court is a mere fiction. Respondent has already pointed out, also, that Petitioner's claim of being denied due process of law by the Com-

missioner, as a result of his consideration of the data furnished with the application, was neither timely nor properly raised, below. Neither was such claim presented to or decided by the Supreme Court of Texas. And, Respondent has pointed out that the state court's decision rested solely on the state court's interpretation of two state court decisions and interpretation of a statement by the Hearing Officer. The state court did not construe, and did not have to construe, any of the state statutes involved because they are clear and unambiguous.

No federal question was either presented to or decided by the state court, here. This Court has repeatedly held that it is without jurisdiction under those circumstances. *Congress of Industrial Organizations v. Robert E. McAdory*, 325 U.S. 472, 89 L.Ed. 1741 (1944); *Southwestern Bell Telephone Company v. State of Oklahoma*, 303 U.S. 206, 82 L.Ed. 751 (1937); and *Cox v. State of Texas*, 202 U.S. 446, 50 L.Ed. 1099 (1905).

Petitioner Neither Timely Nor Properly Raised the So-Called Federal Question

Neither by motion for rehearing before the Savings and Loan Commissioner of Texas nor by pleadings or motion upon judicial review of the administrative order in the district court, nor, for that matter, in either the Court of Civil Appeals or the Supreme Court of Texas, did Petitioner either allege or contend that consideration by the Savings and Loan Commissioner of the data furnished with Respondent's application for charter deprived Petitioner of due process of law. Likewise, Petitioner did not at either level question the constitutionality of those sections of the Texas Savings and Loan Act which ex-

pressly authorized such consideration of that data by the Savings and Loan Commissioner. Actually, Petitioner has not so questioned those sections of the Texas Savings and Loan Act, here, except perhaps impliedly. Nor has Petitioner even suggested that the District Court and the Texas Supreme Court had to construe those clear and unambiguous statutes in deciding the case.

The law of the State of Texas is the same as the decisions of this Court, insofar as the time and manner of raising or preserving a constitutional point of error is concerned. In an ordinary action, not involving judicial review of an order of an administrative agency, the Supreme Court of Texas has held that it will decline to answer the question where it has not been raised in the trial court. *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959).

This Court has consistently held that when the federal question has not been presented prior to the decision by the court of last resort of the state, it comes too late. *Cox v. State of Texas, supra*; and *Miller v. State of Texas*, 153 U.S. 535, 38 L.Ed. 812 (1893).

This Court has held in a number of cases involving orders of administrative agencies that objections to the proceedings of an administrative agency must be made while it has opportunity for correction in order to raise issues reviewable by the courts, and that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice, and that an objection or claim such as the one being made by Petitioner, here, comes too late, when made for the first time in and by a petition in the District Court

to set aside the administrative order. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 97 L.Ed. 54 (1952); *United States v. Capital Transit Company*, 338 U.S. 286, 94 L.Ed. 93 (1949), reh. den., 338 U.S. 901, 94 L.Ed. 554; *Unemployment Compensation Commission of the Territory of Alaska v. Aragon*, 329 U.S. 143, 91 L.Ed. 136 (1946); *United States Ex Rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 71 L.Ed. 560 (1926); *Federal Power Commission v. Colorado Interstate Gas Company*, 348 U.S. 492, 99 L.Ed. 583 (1954); *National Labor Relations Board v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 97 L.Ed. 377 (1952); and *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 364 U.S. 137, 4 L.Ed.2d 1623 (1960).

Should there be deemed to be a distinction between the cases just cited and the instant case because of the fact that a motion for rehearing before the Commissioner was not mandatory, here, then, as Respondent has already pointed out herein, above, neither did Petitioner in its pleadings upon judicial review in the District Court claim or allege that it had been denied due process of law by the Savings and Loan Commissioner as a result of the Commissioner's consideration of the data furnished with Respondent's application for charter.

Decision of State Court Rests on Still Other Adequate Independent State Grounds

The decision of the Supreme Court of Texas rests on still other and further adequate and substantial independent state or non-federal grounds. It has already been pointed out that, insofar as Petitioner's "official notice"

contention is concerned, the decision of the state court rested on that court's interpretation of two state court decisions and that court's interpretation of a statement made by the Hearing Officer. The decision of the state court rests, also, on adequate and substantial state grounds that have no relation to Petitioner's "official notice" contention.

This Court has consistently held that it will not review a decision by the highest court of a state where there are two grounds for the decision only one of which involves a federal question and the other state or local ground is substantial, adequate and sufficient to maintain or support the judgment of the state court, and this Court will accept the decision whether right or wrong without considering the federal question that may have been presented. *Gaar, Scott & Company v. Shannon*, 223 U.S. 468, 56 L.Ed. 510 (1911); *Waters-Pierce Oil Company v. State of Texas*, 212 U.S. 112, 53 L.Ed. 431 (1908); *Bacon v. State of Texas*, 163 U.S. 207, 41 L.Ed. 132 (1895); *Nickel v. Cole*, 256 U.S. 222, 65 L.Ed. 900 (1920); *Minneapolis, St. Paul, & Sault Ste. Marie Railway Company v. Washburn Lignite Coal Company*, 254 U.S. 370, 65 L.Ed. 310 (1920); *Arkansas Southern Railroad Company v. German National Bank*, 207 U.S. 270, 52 L.Ed. 201 (1907); and *Broad River Power Company v. State of South Carolina*, 281 U.S. 537, 74 L.Ed. 1023 (1929).

There was no evasion of a federal question by the state court, here. Petitioner has at least suggested that the Supreme Court of Texas would not concern itself with a federal question, even if timely and properly raised, if the administrative order is otherwise reasonably sup-

ported by substantial evidence. That this is not so is shown in *Lewis, Savings and Loan Commissioner v. Metropolitan Savings and Loan Association,* ____Tex. ____, 550 S.W.2d 11 (1977). See, also, *Lewis, Savings and Loan Commissioner v. Guaranty Federal Savings and Loan Association,* 483 S.W.2d 837 (Tex. Civ. App. 1972; writ of error denied by Supreme Court of Texas with the notation "Refused. No Reversible Error").

The exceptions to the adequate independent state grounds doctrine, represented by *Fay v. Noia,* 372 U.S. 391, 9 L.Ed.2d 837 (1963), and *Henry v. Mississippi,* 379 U.S. 443, 13 L.Ed.2d 408 (1965), obviously are not applicable, here. This is neither a habeas corpus proceeding nor a direct review of a judgment in a criminal case involving a decision resting on independent state grounds which are purely procedural and serve no legitimate state interest.

The Supreme Court of Texas held, here: "However, even if it may be said the application was erroneously admitted into evidence in the trial court, it was not essential to support the Commissioner's order"; that those portions of the application which were used by the Commissioner "in finding the underlying facts supporting his order" were "also included in the direct testimony by witnesses and exhibits offered by the applicants for the charter, thus the documents were cumulative of the direct evidence offered before the Commissioner".

Respondent's application for writ of error in the Supreme Court of Texas was granted on the sole point that the Court of Civil Appeals had erred in holding that the admission in evidence by the District Court of Respondent's application for charter amounted to such a

denial of Petitioner's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case. Then, upon submission of the case, the Supreme Court of Texas decided the additional points of error contained in Respondent's application for writ of error.

It has been held that the purposes to be served by requiring statements of underlying facts in an order of the Savings and Loan Commissioner [required by Section 11.11(4) of the Savings and Loan Act] are to inform the losing party of the testimony and other evidence relied upon by the Commissioner so that such party may intelligently prepare and present an appeal from such order to the District Court and to assist the District Court and appellate courts in properly exercising their function of reviewing that order. *Security Savings and Loan Association of Dickinson v. Lewis, Savings and Loan Commissioner,* 515 S.W.2d 392 (Tex. Civ. App. 1974; no writ). To the same effect, although involving an order of the Railroad Commission, is *Miller v. Railroad Commission of Texas,* ____Tex.____, 363 S.W.2d 244 (1962).

Contrary to what Petitioner would have this Court believe, the bulk of the contents of the documents comprising Respondent's application for charter were not even considered or relied upon by the Savings and Loan Commissioner, as is evidenced by the statements of underlying facts in the order. Insofar as that very small portion of the contents of the application which were relied upon and utilized in the order as underlying facts is concerned, most of such evidence is merely cumulative of other competent evidence to the same effect or of

like import contained in the Commissioner's certified record and the remainder of such evidence is wholly immaterial.

It has been held that the erroneous admission of evidence is not grounds for and does not justify reversal of a judgment, where such objectionably evidence is merely cumulative of other competent evidence to the same effect or of like import. *Lynch Oil Company v. Shepard,* 242 S.W.2d 217 (Tex. Civ. App. 1951; writ ref'd.); *Hanks v. LaQuey,* 425 S.W.2d 396 (Tex. Civ. App. 1968; ref'd. n.r.e.); *Lusinger v. Philpott,* 392 S.W.2d 217 (Tex. Civ. App. 1965; ref'd. n.r.e.); *Aetna Casualty & Surety Company v. Depoister,* 393 S.W.2d 822 (Tex. Civ. App. 1965; ref'd n.r.e.); *Blakney v. Panhandle & Santa Fe Railway Company,* 381 S.W.2d 143 (Tex. Civ. App. 1964; ref'd n.r.e.); *Drake v. Walls,* 348 S.W.2d 62 (Tex. Civ. App. 1961; ref'd. n.r.e.); *Brown v. Dale,* 395 S.W.2d 677 (Tex. Civ. App. 1965; ref'd. n.r.e.); and *Mueller v. Central Power & Light Company,* 403 S.W.2d 901 (Tex. Civ. App. 1966; no writ).

Likewise, it has been held that the erroneous admission of evidence is not grounds for and does not justify reversal of a judgment, where such evidence is wholly immaterial (that is, where the case does not turn on such evidence). *Kirby Lumber Company v. Southern Lumber Company,* 192 S.W.2d 460, aff'd., 145 Tex. 151, 196 S.W.2d 387 (1946); *Miller v. Esunas,* 401 S.W.2d 150 (Tex. Civ. App. 1966; ref'd. n.r.e.); *Altum v. Booth,* 399 S.W.2d 836 (Tex. Civ. App. 1966; no writ); and *Flores v. Missouri-Kansas-Texas Railroad Company,* 365 S.W.2d 379 (Tex. Civ. App. 1963; ref'd. n.r.e.).

It is, also, the law of the State of Texas that error in admitting evidence in a non-jury trial is not grounds for and does not justify reversal of the judgment of the district court, where there is other competent evidence to support the judgment. Furthermore, it will be presumed that the district court disregarded the inadmissible evidence. *Fulbright v. Culbertson,* 429 S.W.2d 179 (Tex. Civ. App. 1968; ref'd. n.r.e.); *Sharkey v. Hollums,* 400 S.W.2d 353 (Tex. Civ. App. 1966; ref'd. n.r.e.); *Haynes v. Henderson,* 345 S.W.2d 857 (Tex. Civ. App. 1961; ref'd. n.r.e.); *Stevens Brothers v. Mills,* 336 S.W.2d 921 (Tex. Civ. App. 1960; ref'd. n.r.e.); *Yzaguirre v. State of Texas,* 427 S.W.2d 687 (Tex. Civ. App. 1968; no writ); *Brunswick Corporation v. Suburban Bowling, Inc.,* 398 S.W.2d 294 (Tex. Civ. App. 1967; no writ); and *Hall v. Hall,* 352 S.W.2d 765 (Tex. Civ. App. 1962; no writ).

Such is the case, here. That is to say, as is shown by the statements of underlying facts in the order of the Savings and Loan Commissioner, which has been reproduced in the Petition For Writ of Certiorari as Exhibit A (page 25 thereof), there is other competent evidence in the Commissioner's certified record to support the ultimate findings made by the Commissioner and the judgment of the District Court. Upon consideration of the other competent evidence, of which the objectionable evidence was merely cumulative, it cannot be reasonably concluded that the Commissioner or the District Court would have reached a contrary result if the Commissioner and the District Court had had before them for their consideration only such other competent evidence. This is precisely what the Supreme Court of Texas has held, here.

It was not the function of the District Court to determine *de novo* the ultimate issues under Section 2.08 of the Texas Savings and Loan Act. The function of the District Court was to make a determination on a pure question of law, to-wit, whether or not the Commissioner acted arbitrarily and without regard to the facts; and, the principal test applicable thereto is whether or not the Commissioner's ultimate findings are reasonably supported by substantial evidence. *Gerst v. Nixon, supra.* It has already been pointed out herein, above, that one of the purposes to be served by requiring statements of underlying facts in an order of the Savings and Loan Commissioner is to assist the District Court in properly exercising his function of reviewing that order. Consequently, in performing that judicial function, the District Court must review the same evidence which the Commissioner relied upon, as reflected in the statements of underlying facts in the order. And, the presumption is, under the authorities cited herein, above, that in doing so the District Court disregarded the inadmissible evidence and considered only the other competent evidence in the Commissioner's certified record.

Respondent probably does not have to demonstrate to this Court, under the adequate independent state grounds doctrine, as it did in the Supreme Court of Texas, that the evidence complained of was either cumulative of other competent evidence in the Commissioner's certified record or was wholly immaterial and that, consequently, the Supreme Court of Texas was correct in reaching the conclusion which it did on that point. However, Respondent is sufficiently uncertain of that portion of the adequate independent state grounds doctrine having to do with this Court's lack of power to decide the correctness or incorrectness of the state court's decision on such grounds, that Respondent deems it necessary to demonstrate this point to at least some extent, here, although not to the lengths that Respondent did so in the Supreme Court of Texas.

It has already been pointed out that the order of the Savings and Loan Commissioner has been reproduced as an exhibit in the Petition For Writ of Certiorari. The evidence complained of is easily distinguishable from the other competent evidence in the Commissioner's certified record. References in the statements of underlying facts in the order to "H. on Appl., p. . . ." and to "Applicant's Exhibit No. . . ." are references to that other competent evidence in the Commissioner's certified record. By comparing the one with the other, on each ultimate finding of fact made by the Commissioner, the inescapable conclusion is reached that the decision of the Supreme Court of Texas and of the District Court on this point was a correct one. For example, without laboring the point, it can be seen that the data furnished with the application which was utilized as underlying fact 1e [page 29 of the Petition For Writ of Certiorari] is merely cumulative of the other competent evidence utilized as underlying facts 1g and 1j [page 30 of the Petition For Writ of Certiorari].

All of the other competent evidence of which the objectionable evidence is merely cumulative was received in evidence without objection, upon the hearing before the Savings and Loan Commissioner.

Contents of the application utilized as underlying fact 1d in the order are wholly immaterial because the "prerequisite" to which such evidence pertains is not "applicable". It is not applicable because such stock obviously

cannot be issued by Respondent until its application for a savings and loan association charter has been finally approved through the final adjudication of this cause. Likewise, for the same reasons, that portion of the contents of the application utilized as underlying fact 1f pertaining to "in advance of issuance" is wholly immaterial.

The only issues which were actually contested, in the sense of both sides adducing evidence thereon at the hearing, were the issues pertaining to public need, volume of business and possible undue harm to existing associations, those issues being the requirements under Sections 2.08(3) and 2.08(4) of the Savings and Loan Act. On those issues, in only one instance were contents of the application utilized in the order as underlying facts. That one instance was the evidence utilized as underlying facts 9b [page 39 of the Petition For Writ of Certiorari] and 10a [page 51 of the Petition For Writ of Certiorari], and was some of the contents of the instrument entitled "City Savings Association — League City, Texas — Projected Income and Expense". That instrument or document was part of the data furnished with Respondent's application. Counsel for Petitioner and counsel for other protestants had examined that instrument or document in connection with their examination of Respondent's entire application for charter, prior to the hearing before the Commissioner; had such instrument or document before them at the hearing; and cross-examined Respondent's witness, Lammers, at length about the contents of such instrument or document (H. on Appl., pages 26-30). In addition, that particular evidence, too, was merely cumulative of other competent evidence utilized in the underlying facts supporting the ultimate findings on public need, sufficient volume of business and no undue harm to existing associations.

Rule 503, Texas Rules of Civil Procedure, is not unlike 28 U.S.C. § 2111 and Rule 61, Federal Rules of Civil Procedure. And, the decisions of the federal courts are completely consistent and compatible with the Texas cases cited herein, above, construing Rule 503, on the matter of any error in the admission or exclusion of evidence being harmless where the evidence allegedly improperly admitted or excluded was merely cumulative of other competent evidence of like or similar import. *Selected Investments Corporation v. Duncan*, 260 F.2d 918 (10th Cir. 1958), cert. den., 359 U.S. 914, 3 L.Ed. 2d 576 (1959); *American Motorists Insurance Company v. Landes*, 252 F.2d 751 (5th Cir. 1958); *Brooks v. Texas General Indemnity Company*, 251 F.2d 15 (5th Cir. 1958); *Gordon v. Robinson*, 210 F.2d 192 (3rd Cir. 1954); and *Masterson v. Pennsylvania Railroad Company*, 182 F.2d 793 (3rd Cir. 1950).

The decision of the Supreme Court of Texas rests on substantial, adequate and sufficient independent state or non-federal grounds.

CONCLUSION

No federal question is before this Court. No federal question was before the Supreme Court of Texas. No federal question was decided by the Supreme Court of Texas. No federal question was either timely or properly raised, below, by Petitioner. The only possible federal question in this cause has been raised and presented for the first time in this Court. The decision of the Supreme

Court of Texas rests on adequate and substantial independent non-federal or state grounds.

The Petition For Writ of Certiorari should be dismissed. In the alternative, the Petition For Writ of Certiorari should be denied. In either event, all costs should be taxed against Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dow H. Heard, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three (3) copies of the foregoing "Brief in Opposition to Petition for Writ of Certiorari" on counsel for Petitioner by depositing same in a United States post office, with first class postage prepaid, addressed to Mrs. Mary Joe Carroll, P. O. Box 1148, Austin, Texas. 78767, on this 12th day of June, 1978.

DOW H. HEARD

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Texas Savings and Loan Act, Article 852a, Revised Civil Statutes of the State of Texas:

"Sec. 2.01. Application for a charter for a savings and loan association may be made by five (5) or more citizens of this State (hereinafter referred to as incorporators) by tendering to the Commissioner along with the proper filing fee, an application consisting of the following:

"(1) Two (2) copies of Articles of incorporation for the proposed association stating (i) the name of the association, (ii) the site of the principal office and (iii) the names and addresses of the initial directors.

"(2) A statement as to (i) the amount, if any, of Permanent Reserve Fund Stock which has been subscribed and paid for at the time of filing, (ii) the names and addresses of such subscribers and the amount subscribed by each, (iii) the amount of savings liability, if any, with which the association will commence business, (iv) the amount of paid-in surplus or expense fund with which the association will commence business.

"(3) Two (2) copies of the bylaws under which the association proposes to operate.

"(4) Statements, exhibits, maps and other data sufficiently detailed and comprehensive as to enable the Commissioner to pass upon the matters set forth in Section 2.08(2), (3) and (4) of this Act and such other information in regard to the proposed association and its operation as may be required by duly promulgated rules and regulations of the Commissioner and the Building and Loan Section of the Finance Commission of Texas.

"The Articles of incorporation and all statements of fact tendered to the Commissioner in connection with an application for charter shall be subscribed and sworn to under the sanction of an oath, or such affirmation as is by law equivalent to an oath, made before an officer authorized to administer oaths.

"Sec. 2.02 The charter of an association may provide for the issuance of Permanent Reserve Fund Stock. No other form or type of stock or shares may be issued. Such Permanent Reserve Fund Stock, when issued, may not be retired or withdrawn except as hereinafter provided, until after all liabilities of the association shall have been satisfied in full, including the withdrawal value of all savings accounts. Such stock must be fully paid for in cash in advance of issuance and the association may not make any loans against the shares of such stock. Shares of such stock may be issued with par value of not less than One Dollar ($1) nor more than One Hundred Dollars ($100). With the prior written approval of the Commissioner as to the number of shares to be issued, the bylaws of an association may provide that its Permanent Reserve Fund Stock may be issued with no par value. An association authorized to issue such stock must have at all times issued and outstanding stock with a value on its books of at least Twenty-five Thousand Dollars ($25,000) or two and one-half per cent (2½%) of its gross assets, whichever is greater, but no association shall be required to have an amount of such stock with a value on its book of more than Two Hundred and Fifty Thousand Dollars ($250,000). Associations whose savings accounts are insured by the Federal Savings and Loan Insurance Corporation may retire in whole or in part any such stock heretofore issued when such associations are authorized to do so by a majority vote at any annual meeting of its members, or any special meeting of members called

for such purpose; provided, that the basis of such retirement shall have been first approved by the Commissioner and consent to such retirement upon the part of the Federal Savings and Loan Insurance Corporation has been filed in writing with the Commission.

"Sec. 2.03. Incorporators of proposed associations with authority to issue Permanent Reserve Fund Stock, as a prerequisite to the approval of an application for a charter shall be required to have subscribed and paid for in cash to the credit of the proposed association an aggregate amount of Permanent Reserve Fund Stock as the Commissioner shall specify within the limits set for such stock in the preceding Section. Such stock shall be issued within thirty (30) days from the date of incorporation.

"Sec. 2.04. As a prerequisite to approval of any application for a proposed association with authority to issue Permanent Reserve Fund Stock the Commissioner may require in addition to the amount paid in for such stock a paid-in surplus up to but not in excess of the aggregate amount of the Permanent Reserve Fund Stock required under the preceding Section. Such paid-in surplus may be used in lieu of earnings to pay organization and operating expenses, dividends on savings accounts and to meet any loss reserve requirements. If the application should not be approved or if the proposed association does not proceed to do business, the stock subscriptions for Permanent Reserve Fund Stock and paid-in surplus shall be returned pro-rata to the subscribers, less any lawful expenditures.

"Sec. 2.05. As a prerequisite to the approval of an application for a charter of an association without Permanent Reserve Fund Stock the incorporators must show to the satisfaction of the Commissioner . . .

"Sec. 2.06. In addition to the savings account subscriptions required by the preceding Section the incorporators of an association without Permanent Reserve Fund Stock must show to the satisfaction of the Commissioner . . .

"Sec. 2.07. When a proper application for a charter has been filed, the Commissioner shall cause public notice of such application to be given and give any interested party an opportunity to appear, present evidence and be heard for or against such application.

"Sec. 2.08. The Commissioner shall not approve any charter application unless he shall have affirmatively found from the data furnished with the application, the evidence adduced at such hearing and his official records that:

"(1) The prerequisites, where applicable, set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 have been complied with and that the Articles of incorporation comply with all other provisions of this Act;

"(2) the character, responsibility and general fitness of the persons named in the Articles of incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act and that the proposed association will have qualified fulltime management;

"(3) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation;

"(4) the operation of the proposed association will not unduly harm any existing association.

"If the Commissioner so finds, he shall state his findings in writing and issue under his official seal a certificate of incorporation and deliver a copy of the approved Articles of incorporation and bylaws to the incorporators and retain a copy thereof as a permanent file of his office, whereupon the proposed association shall be a corporate body with perpetual existence unless terminated by law and may exercise the powers of a savings and loan association as herein set forth.

* * * * *

"Sec. 11.11. (1) . . . Notice of all other hearings held under any provision of this Act shall be given to all associations and Federal associations in the county where the subject matter of the hearing is or will be situated.

"(2) Opportunity shall be afforded any interested party to respond and present evidence and argument on all issues involved in any hearing held under any provision of this Act.

"(3) Upon the written request of any interested party the Commissioner shall keep a formal record of the proceedings of any hearing held under any provision of this Act.

"(4) . . . [set out by Petitioner]

"(5) A decision or order entered after hearing shall be final and appealable fifteen (15) days after the day the same is entered unless a motion for rehearing is filed by a party within such time and if the motion for rehearing is overruled such decision or order shall be final and appealable from and after the date the order overruling such motion is entered.

"(6) Parties to a hearing shall be promptly notified either personally or by mail of any decision, order or other action taken in respect to the subject matter of the hearing.

"Sec. 11.12. Any party with an interest in the subject matter thereof who is dissatisfied with any act, order, ruling or decision of the Commissioner taken or made, or with any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission in connection with the administration of this Act, may secure judicial review thereof in the following manner:

"(1) Venue. (a) . . . .

"(b) Proceedings for review of other acts, orders, rulings or decisions of the Commissioner or of any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission may be instituted by filing a petition as in a civil action generally against the Commissioner, as defendant, in a district court of Travis County and not elsewhere.

"(2) Time for Filing. Any petition for judicial review must be filed within thirty (30) days after the action, order, ruling or decision of the Commissioner is final or the rule or regulation complained of is promulgated.

"(3) Stay of Enforcement. . . . .

"(4) . . . . [set out by Petitioner]

"(5) Trial. (a) . . . .

"(b) . . . . [set out by Petitioner]

"(6) Burden of Proof and Judgment. The burden of proof shall be on the plaintiff. The reviewing court may affirm the action complained of or remand the matter to the Commissioner for further proceedings.

"(7) Appeals. Appeals from any final judgment may be taken by either party in the manner provided for in civil actions generally, . . ."

Texas Rules of Civil Procedure, Rule 503:

". . .

"Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that an error of law has been committed by the trial court in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, . . .

". . ."

28 U.S.C. § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure, Rule 61:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."